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OPINION OF THE ATTORNEY GENERAL OF THE UNITED STATES

SECOND LIBERTY BOND ACT— FOREIGN CURRENCY OBLIGATIONS

Obligations payable in foreign currency may be issued under § 16 of the Second Liberty Bond Act, 31 U.S.C. § 776, as direct obligations of the United States.

Funds have been appropriated for payment of these foreign currency obligations, including any so-called "exchange losses" that might arise in conjunction with their issuance.

DECEMBER 11, 1978

THE SECRETARY OF THE TREASURY

MY DEAR MR. SECRETARY: This is in response to your request for my opinion in connection with your Department's proposed issuance, under the Second Liberty Bond Act ("the Act"),[1] of bonds, notes or certificates of indebtedness which, by their terms, would be both purchased for and payable in foreign currencies. Two questions are presented: (1) whether these obligations may be issued and made payable under § 16 of the Second Liberty Bond Act, 31 U.S.C. § 766, as direct obligations of the United States; and (2) whether funds have been appropriated for payment of these foreign currency obligations, including any so-called "exchange losses" that may arise in conjunction with their issuance. For the reasons that follow, my opinion on both questions is in the affirmative.

I.

Bonds, notes, or certificates of indebtedness issued pursuant to the Second Liberty Bond Act are termed borrowings "on the credit of the United States."[2] Section 16 of the

[1] Act of Sept. 24, 1917, c. 56, 40 Stat. 288, as amended.

[2] See § 1 (31 U.S.C. § 752), § 5 (31 U.S.C. § 754), § 18 (31 U.S.C. § 753).

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Second Liberty Bond Act, 31 U.S.C. § 766, provides in pertinent part: Any of the bonds, notes, or certificates of indebtedness authorized by this Act may be issued by the Secretary of the Treasury payable, principal and interest, in any foreign money or foreign moneys, as expressed in such bonds, notes or certificates, but not also in United States coin ....[3]

Therefore, obligations payable in foreign currency and issued pursuant to § 16 are part of the public debt and constitute direct obligations of the United States.

The prices at which, and manner in which, obligations to be issued under § 16 may be offered are matters committed to the discretion of the Secretary of the Treasury. Specifically, the decision whether these obligations should be issued for dollars or for foreign currencies is also a matter left to his discretion. A wide range of proposed offerings would fall within the realm of that discretion and therefore be authorized by law.

Obligations issued pursuant to § 16 are to be "payable, principal and interest, in any foreign money or foreign moneys, as expressed in such bonds, notes, or certificates." Because of possible fluctuations in the rate of exchange of the dollar *vis-a-vis* foreign currencies, it must carefully be considered whether § 16 was intended to authorize issuance of obligations to be repaid in an agreed amount of foreign currency, or rather simply to permit the delivery of the foreign currency equivalent of the original dollar value of the obligation, determined on the basis of the rate of exchange prevailing at the date of redemption. In light of the provision's plain language, legislative history and past administrative practice, I believe the former interpretation to be correct.

It should first be noted that § 16 expressly provides that: In determining the amount of bonds, notes, and certificates issuable under [the Second Liberty Bond] Act the dollar equivalent of the amount of any bonds, notes, or certificates payable in foreign money or foreign moneys shall be deter-

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[3] Act of Sept. 24, 1917, c. 56, § 16, as added Apr. 4, 1918, c. 44, § 6, 40 Stat. 505, and amended Nov. 13, 1966, Pub. L. No. 89-809, § 401, 80 Stat. 1590. The 1966 amendment simply inserted the word "notes" following "bonds," wherever appearing.

mined by the par of exchange at the date of issue thereof, as estimated by the Director of the Mint, and proclaimed by the Secretary of the Treasury, in pursuance of the provisions of section 372 of [title 31].

This language provides little guidance. It simply specifies that foreign currency obligations are to be treated as having a firm dollar equivalent for purposes of applying the ceiling on the amount to be borrowed pursuant to the Act.[4] Section 16 was enacted at a time when a system of floating rates of exchange was in effect.[5] Therefore, some mechanism for determining the dollar value of foreign currency obligations was clearly necessary for accounting purposes. To resolve the problem, Congress required that the ceiling on the amount of federal borrowing to be undertaken pursuant to the Act should be calculated in terms of the original dollar value of foreign currency obligations. However, it does not necessarily follow that Congress, at the same time, intended that obligations "payable in" foreign currency were to be paid at the original U.S. dollar equivalent of their face value even though, as a result of fluctuations in the exchange rate, the value of the foreign currency in which the obligation was payable might have appreciated or depreciated as against the dollar.

It is, in my view, much more significant that the language of § 16 gives the Secretary unqualified authority to dispose of foreign currency obligations "in such manner and at such prices ... as he may determine," including by implication, the authority to issue obligations measured in and to be repaid in foreign currencies. The statute's legislative history, moreover, provides more telling evidence of congressional intent, in particular revealing Congress' concern regarding the disadvantageous exchange position of the U.S. dollar. The pertinent committee reports state that § 16 was designed to "make it possible for the Secretary of the Treasury to take steps to rectify the position of dollar ex-

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[4] This provision also identifies the procedures to be used in calculating the rate of foreign exchange. These procedures have been rendered obsolete by the successive changes in the international monetary system since 1918. Today, no par of exchange for the U.S. dollar vis-a-vis any other currency is either declared or maintained by the U.S. Government.

[5] *Annual Report of the Secretary of the Treasury on the State of the Finances* 38-40 (1918).

change in those neutral countries where the dollar is at a disadvantage to-day [,] ... where the balance is against us and where our exchange position is disadvantageous."[6] The committees unanimously expressed the view that "this provision will greatly facilitate the negotiations which the Treasury Department must enter into in order to relieve foreign exchange problems."[7] It is noteworthy that these statements were made under an international monetary system of fluctuating rates. In this context, movements in the exchange rate of the dollar could result in exchange gains or losses on obligations denominated in a foreign currency. Had Congress intended that the Secretary avoid exposing the United States to normal exchange risk associated with such international transactions, it could easily have done so in the language of § 16. Absent any such specific direction or limitation, § 16 should be given its plain meaning so as to permit the issuance of obligations which effectively guarantee the return of principal and interest in the form of a specific sum of foreign currency. *See Malat* v. *Riddell*, 383 U.S. 569, 571 (1966).

Moreover, this interpretation is in accord with the consistent past administrative practice of your Department. In 1920 the Secretary of the Treasury reported that foreign currency obligations issued during World War I pursuant to § 16 had been repaid with a net gain to the United States as a result of the appreciation of the dollar with respect to the Spanish peseta.[8] There would not have been a gain if § 16 had been interpreted to require repayment of the amount of foreign currency equivalent to the face value of the obligations in U.S. dollars at the time of issuance. Similarly, during the 1960's obligations were issued by the U.S. Government payable in fixed amounts of foreign currency.[9] In some instances, the dollar depreciated *vis-a-vis* the foreign currency in which a security was payable, so as to result in an exchange loss when obligations were repaid. The terms

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[6] H.R. Rep. No. 428, 65th Cong., 2d Sess. 6 (1918). S. Rep. No. 351, 65th Cong., 2d Sess. 6 (1918).

[7] H.R. Rep. No. 428, *supra* note 6, at 7; S. Rep. No. 351, *supra* note 6, at 7.

[8] *See Annual Report of the Secretary of the Treasury on the State of the Finances* 68-69 (1920).

[9] *See Annual Report of the Department of the Treasury on the Exchange Stabilization Fund for the Year Ending September 30, 1977* 10 (1978).

of the obligations had specified repayment of a fixed sum of foreign currency, not the prevailing foreign currency equivalent as of the date of repayment of the initial dollar value of the obligations.

It is my opinion that you are legally authorized pursuant to § 16 of the Act to issue obligations for such prices, in dollars or foreign currency as you may deem appropriate, to be payable in foreign currency, notwithstanding any appreciation or depreciation of the dollar that may occur between the time of issuance and the time of redemption of the obligations.

II.

The Constitution expressly provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." Art. I, § 9, cl. 7. You have asked whether there exists a statutory appropriation for payment of any so-called "exchange losses" that might arise in conjunction with the issuance of foreign currency obligations pursuant to § 16 of the Second Liberty Bond Act. In my opinion, appropriations available in the general fund can be utilized to meet such obligations, including any exchange losses which arise as a result of fluctuations in the value of the dollar *vis-a-vis* the foreign currency in which they are to be repaid.

Congress has specifically identified certain legislation as an appropriation of funds and has further provided that those funds are to be permanently available and not limited to a fixed amount. One such permanent, indefinite appropriation, set forth in 31 U.S.C. §§ 711(a) and 732, is that for interest on the public debt.[10] Under the terms of these provisions, money in the Treasury, not otherwise appropriated, may be used for payment of interest, including that accruing on the portion of the public debt represented by foreign currency obligations issued pursuant to § 16.

Although not in the same manner specifically designated as a permanent, indefinite appropriation, § 19 of the Second Liberty Bond Act, 31 U.S.C. § 754a, provides similar

[10]These provisions are derived from the Act of Feb. 9, 1847, c.7, 8 Stat. 123.

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assurance that funds to meet the balance of the obligations thus incurred, including any part of that sum that may be attributable to exchange rate fluctuations, will be available from the general fund of the Treasury. This provision states: Any obligations authorized by [the Second Liberty Bond] Act may be issued for the purchase, redemption, or refunding, at or before maturity, of any outstanding bonds, notes, or certificates of indebtedness, Treasury bills, or savings certificates of the United States, and any money received from the sale of such obligations or any other money in the general fund of the Treasury may, under such rules, regulations, terms and conditions as the Secretary of the Treasury may prescribe, be used for such purchase, redemption, or refunding.[11]

In determining whether § 19 constitutes a permanent, indefinite appropriation reference must be made to 31 U.S.C. § 627, which sets forth in statutory form the governing rule of construction: No act of Congress passed after June 30, 1906 shall be construed to make an appropriation out of the Treasury of the United States, or to authorize the execution of a contract involving the payment of money in excess of appropriations made by law, unless such Act shall in specific terms declare an appropriation to be made or that a contract may be executed.[12]

While this provision makes it clear that an appropriation should not be found in the absence of explicit language, there may be a valid appropriation even in the absence of the words "appropriate" or "appropriated;" "[a]ny other words equally broad in their meaning would specifically appropriate." 13 Comp. Dec. 729, 733 (1907). *See also* 23 Comp. Dec. 167, 170 (1916). Thus, "[i]t has been uniformly held that a specific direction to pay and a designation of the funds to be used for the purpose do make an appropriation." 13

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[11] Act of September 24, 1917, c. 56, § 19, as added Jan. 30, 1934, c. 6, § 14(a)(4), 48 Stat. 343, and amended Mar. 28, 1942, c. 235, § 4, 56 Stat. 189. As originally enacted in 1934 the provision made no reference to use of money in the general fund of the Treasury. It was expanded to its current form in 1942.

[12] Act of June 30, 1906, c. 3914, § 9, 34 Stat. 764. Even prior to the enactment of this provision it had been recognized that "a statute should not be construed as making an appropriation, or authorizing the expenditure of money, unless the language is sufficiently explicit to clearly justify it; authority for the use of public money cannot arise by inference without very clear terms requiring it." 18 Op. Att'y Gen. 174, 176 (1885).

Comp. Gen. 77, 80 (1933). Although the language of § 19 reserves to the Secretary of the Treasury the discretion to use any of a variety of means to purchase or redeem outstanding obligations, the section clearly authorizes payment and specifies the funds to be utilized for that purpose. It thus provides ample evidence that Congress intended that an appropriation, not limited as to amount or duration, be made.

In 1942, the General Counsel's Office of the Treasury Department also expressed a similar view.[13] Such an interpretation of § 19, adopted by the agency charged with the statute's administration contemporaneously with the statutory amendment that gave this provision its current form, is not lightly to be disturbed. *See, e.g., United States* v. *National Association of Securities Dealers, Inc.*, 422 U.S. 694, 719 (1975). This interpretation is, moreover, consistent with Congress' longstanding commitment to provide money in the general fund for the payment of the public debt. Since 1881, the Secretary has been permitted "at any time [to] apply the surplus money in the Treasury not otherwise appropriated, or so much thereof as he may consider proper, to the purchase or redemption of the United States bonds . . . ." 31 U.S.C. § 741, Act of Mar. 3, 1881, c. 133, § 2, 21 Stat. 457. Similarly, since 1869, the "faith of the United States" has been "solemnly pledged to the payment in coin or its equivalent . . . of all the interest-bearing obligations of the United States . . . ." 31 U.S.C. § 731, Act of Mar. 18, 1869, c. 1, 16 Stat. 1. You have indicated that, since 1921, the Treasury Department's "Combined Statement of Receipts and Expenditures of the Government," relying on this authority, has included an account entitled "Public Debt — Redemption," symbolized and referred to as a permanent, indefinite appropriation account. The similar language of § 19 was intended to supplement the authority existing under 31 U.S.C. §§ 731 and 741 by providing the Secretary with greater flexibility in managing the public debt.[14] Thus, he was

[13] M-607, Memoranda files of the General Counsel, Department of the Treasury (Feb. 26, 1942). The memorandum concluded that the language "may be used for," that was included in the amendment to § 19 of the Second Liberty Bond Act passed by Congress one month later, constituted an appropriation of funds.

[14] *Hearings on H.R. 6691 Before the House Committee on Ways and Means*, 77th Cong., 2d Sess. 3 (1942).

authorized to use available funds for purposes of purchase, as well as redemption, and was expressly permitted to take such action with regard to a variety of obligations, not simply bonds.[15]

Referring as it does to purchase or redemption of "[a]ny obligations authorized by [the Second Liberty Bond] Act," § 19 therefore provides a permanent, indefinite appropriation for payment of principal on the public debt, whether the debt is denominated in U.S. dollars or a foreign currency. This appropriation, together with that authorizing the payment from the general fund of interest on the public debt, thus provides ample assurance that there exists a sufficient appropriation for payment of the public debt including any exchange losses that might arise in conjunction with the issuance of foreign currency obligations under § 16 of the Second Liberty Bond Act.

III.

One further matter remains to be considered. An Exchange Stabilization Fund (ESF) was established in 1934 by § 10 of the Gold Reserve Act, Act of Jan. 30, 1934, c. 6, 48 Stat. 341.[16] This fund is specifically designated for use in stabilizing the exchange value of the dollar. Two questions are raised: (1) whether the authority provided by § 16 of the Second Liberty Bond Act for the Secretary of the Treasury to borrow foreign currencies was limited in any way by establishment of the ESF; and (2) whether, in light of the practice of the Treasury Department during the last decade of using the ESF to absorb any exchange losses on connection with issuance of foreign currency obligations, moneys in the general fund made available pursuant to § 19 may nevertheless be used to meet any exchange losses incurred as a result of this proposed offering. I believe that neither the creation nor the past utilization of the ESF has limited

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[15] H.R. Rep. No. 1876, 77th Cong., 2d Sess. 3-4 (1942); S. Rep. No. 1173, 77th Cong., 2d Sess. 3 (1942).

[16] This provision was subsequently amended. See Act of Jan. 23, 1937, c. 5, § 1, 50 Stat. 4; Act of July 6, 1939, c. 260, §§ 1 and 2, 53 Stat. 998; Act of June 30, 1941, c. 265, § 1, 55 Stat. 395; Act of Apr. 29, 1943, c. 76, §§ 1 and 2, 57 Stat. 68; Act of July 31, 1945, c. 339, § 7(a), 59 Stat. 514; Act of Dec. 30, 1970, Pub. L. No. 91-599, c. 4, §§ 41 and 42, 84 Stat. 1659; Act of Oct. 19, 1976, Pub. L. No. 94-564, § 7,90 Stat. 2661; Act of Oct. 28, 1977, Pub. L. No. 95-147, § 4(b), 91 Stat. 1229. As codified, it appears at § 822a of title 31.

the Secretary's authority to meet foreign currency obligations issued pursuant to § 16 using money available in the general fund of the Treasury.

The legislative history of the Gold Reserve Act evidences no intent to limit the authority of the Secretary of the Treasury to issue public debt obligations payable in foreign currency.[17] Rather, the ESF was envisioned as a powerful addition to the tools and resources available to the Secretary to help relieve foreign exchange problems and a means by which the Secretary could counter the efforts of other nations, using similar funds, to manipulate the international money market and to improve their balance of trade at the expense of the United States.[18] The ESF thus provided a fund with which the Secretary, by selling U.S. dollars, could counter foreign pressures, then deemed undesirable, for upward valuation of the U.S. dollar. The ESF also provided a means by which exchange rate fluctuations could be countered through a wide range of techniques (the Secretary was authorized "to deal in gold and foreign exchange and such other instruments of credit and securities as he may deem necessary" to carry out the purposes of the ESF) using a ready and available source of financing for these transactions without the delay that would be incident to the sale of government obligations. Thus, the creation of the ESF served as an additional means of relieving foreign exchange problems and should in no way be construed as a limitation on the Secretary's authority, under § 16, to issue foreign currency obligations.

Neither does the practice of the Treasury Department, during the 1960's, of using the ESF to absorb any exchange losses associated with issuance of foreign obligations bar reliance on an appropriation from the general fund of the Treasury for that purpose. The Comptroller General has indicated that where two accounts might be charged with a particular class of expenditures and as a matter of administrative discretion one account is utilized for such purposes, that account must continue to be used and the second

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[17] See H.R. Rep. No. 292, 73d Cong., 2d Sess. 3-4 (1934); S. Rep. No. 201, 73d Cong., 2d Sess. 2-3 (1934). *See also* S. Doc. No. 114, 73d Cong., 2d Sess. (1934) (Presidential message).

[18] See H.R. Rep. No. 292, *supra* note 17, at 3-4; S. Rep. No. 201, *supra* note 17, at 2-3.

account cannot instead later be employed. *See, e.g.*, 10 Comp. Gen. 440, 442 (1931); 15 Comp. Dec. 101 (1908). Significantly, however, these decisions operate on the unstated assumption that the agency, as part of its appropriations requests, and Congress, in providing the requested appropriations, evidences the intention that a specific class of expenditures were to be met from one and only one account. That it, Congress, through its actions, has limited the agency's pre-existing discretion to use either of two appropriations for a particular category of expenditures. Such a case is not presented here, where Congress has expressly made money in the general fund available for purposes of meeting certain exchange losses notwithstanding the availability of the ESF as an additional source of funds for use in stabilizing the exchange value of the dollar. Since Congress has not, through subsequent actions, limited the Secretary's authority to use money in the general fund to meet the public debt obligation, that appropriation remains available for purposes of meeting public debt obligations issued under § 16.

In sum, it is my opinion that you are legally authorized under § 16 of the Second Liberty Bond Act to issue and redeem obligations payable in foreign currencies; and that an appropriation has been made to meet all such direct obligations of the United States that would be so incurred, including any "exchange loss" which might occur.

Sincerely,

GRIFFIN B. BELL.

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DEPOSITORY 376

OPINION OF THE ATTORNEY GENERAL OF THE UNITED STATES

DISPOSITION BY TREATY OF TERRITORY OR PROPERTY BELONGING TO THE UNITED STATES

Under Article II, § 2, cl. 2 of the Constitution the President, with the approval of two-thirds of the Senators present, may make treaties on all proper subjects for negotiation between our Nation and others, including subjects within the legislative jurisdiction of Congress.

Under Article IV, § 3 of the Constitution Congress has power to dispose of territory or property belonging to the United States, but the existence of that power does not suggest that the President and the Senate have no power to dispose of such territory or property by treaty under Article II.

The history of Article II, § 2, cl. 2, the treaty practice and the relevant judicial decisions suggest that the power to dispose of territory or property belonging to the United States is possessed both by the Congress and by the treaty-making authority; and it may be exercised by the latter through self-executing treaties concluded under Article II without the authorization or approval of Congress under Article IV.

AUGUST 11, 1977

THE SECRETARY OF STATE.

MY DEAR MR. SECRETARY: Your letter of July 23, 1977, requests my opinion, in connection with the negotiation of a new Panama Canal treaty, on a question involving the treaty-making power of the President and its relation to the power of Congress to dispose of territory or property belonging to the United States. The question is whether a treaty may dispose of territory or property belonging to the United States absent statutory authorization.

I.

The Constitution provides that the President shall have power to make treaties with the advice and consent of the

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Senate, if two-thirds of the Senators present concur (Article II, section 2, clause 2); and it provides further that treaties made under the authority of the United States shall be the "supreme law of the land." Article VI, clause 2.

At the same time, the Constitution gives Congress a number of specific powers that bear upon matters commonly subjected to the treaty power. I need mention but a few: pursuant to Article I, section 8, Congress has power to regulate foreign trade, to provide for the protection of rights in useful inventions, to make rules governing captures on land and water, to establish a uniform rule for naturalization, and to punish offenses against the law of nations; and, of course, pursuant to Article IV, section 3, Congress has power to dispose of territory or property belonging to the United States. Moreover, there is authority for the proposition that Congress has general power, quite apart from these specific powers, to enact legislation relating to foreign affairs. *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *Perez* v. *Brownell*, 356 U.S. 44 (1958).

A question that arose very early in our constitutional history was whether the existence of these congressional powers limits the power of the President and the Senate to make law by treaty.[1] If a treaty touches a matter that Congress has power to regulate, can the treaty be given the force and effect of law, in and of itself, if Congress has not enacted legislation putting it into effect? The question you raise is one aspect of that general question.

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[1] Indeed, the question arose in connection with the debate over the very first treaty made under the Constitution, the Jay Treaty with Great Britain. The treaty provided for the creation of certain commissions and therefore required an appropriation of funds. President Washington, together with other Federalists, including Hamilton and Chief Justice Ellsworth, took the view that the treaty, of its own force, created an indispensable obligation as a matter of domestic law, and that Congress was required to appropriate the necessary funds. Jefferson, Madison, and other Republicans took the view that neither the Jay Treaty nor any other treaty could regulate matters that were within the legislative jurisdiction of Congress. *See* 1 *C. Butler, The Treaty-Making Power of the United States* 422 *et seq.* (1902); *S. Crandall, Treaties Their Making and Enforcement* 165 *et seq.* (2d ed. 1916); 1 *W. Willoughby, The Constitutional Law of the United States* 549 (2d ed. 1929). Jefferson reiterated the Republican view in his *Manual of Parliamentary Practice. See L. Henkin, Foreign Affairs and the Constitution* 141 *et seq.* (1972) [hereinafter cited as *Henkin*].

II.

I shall make two observations with respect to the general issue. First, from the earliest days of the Republic the decisions of the Supreme Court have provided convincing support for the proposition that a treaty, unaided by an act of Congress, has the force and effect of law even if it touches a matter that is within the legislative jurisdiction of Congress. Indeed, the Court has held that a treaty, of its own force, may supplant prior acts of Congress to the extent that its enforcement may require that result. *Cook* v. *United States*, 288 U.S. 102 (1933).

The seminal case, *United States* v. *The Schooner Peggy*, 1 Cranch 103 (1801), was decided in an opinion by Chief Justice Marshall. During the undeclared naval war with France, Congress enacted a statute that authorized the President to grant commissions to public vessels, with instructions that they should seize armed French vessels on the high seas, bring them to our ports, and subject them to condemnation in the courts of the United States. Act of July 9, 1798, c. LXVIII, 1 Stat. 578. In 1800 the American ship *Trumbull*, sailing under a commission issued pursuant to the statute, seized an armed French vessel, the schooner *Peggy*, and brought her to port. A proceeding was then instituted against the *Peggy*; and after a sentence of condemnation was entered in the court below, an appeal was taken to the Supreme Court.

During the pendency of the appeal President Jefferson, with the advice and consent of the Senate, concluded a treaty with France. The treaty provided, among other things, that vessels that had been seized by either nation should be "mutually restored" if they were not yet "definitively condemned."

Thus, when the case of the *Peggy* came before the Court, the question was whether the treaty controlled the disposition of the prize. If it did, the schooner was to be restored to France. If it did not, the schooner was to be condemned, under the statute; and the proceeds were to be distributed equally between the United States and the officers and men of the *Trumbull*.

The Court held that the treaty controlled. It was a law of the United States, not by virtue of any act of Congress,

but by virtue of the command of the Constitution itself; and it had intervened during the appeal to change the statutory rule that had governed the decision below. Because the sentence of condemnation was not yet final, the schooner was not yet "definitively condemned," and it was therefore subject to the treaty. The schooner was to be restored to France. 1 Cranch at 109–10.

Implicit in the decision was the elementary proposition that the President, with the advice and consent of the Senate, had power to make a self-executing treaty affecting the disposition of a vessel captured at sea even though Congress had power to make rules (and had in fact made a conflicting rule) governing the same subject matter. The Court expressed no doubt whatever about the constitutionality of the treaty.

In the years that followed this decision the Supreme Court gave "self-executing" effect to numerous treaties that disposed of matters that Congress had power to regulate. See, e.g., *Hijo* v. *United States*, 194 U.S. 315, 323–24 (1904) (claims against the United States); *Cook* v. *United States*, 288 U.S. 102, 118–19 (1933) (customs inspections); *Bacardi* v. *Domenech*, 311 U.S. 150, 161 (1940) (trademarks); see generally *Henkin*, *supra*, note 1, at 149. Today, as a result of these and other decisions, it could not be successfully maintained, as a general proposition, that the treaty power stops where the power of Congress begins. On the contrary, the Court has said that the treaty power, operating of itself and without the aid of congressional legislation, extends to all proper subjects for negotiation between our Nation and others. *Asakura* v. *City of Seattle*, 265 U.S. 332 (1924). The lesson of history is that these "proper subjects" include many that are within the legislative jurisdiction of Congress.

My second observation is related to the first. I have suggested that the two powers—the power of Congress to legislate and the power of the President and the Senate to make "self-executing" treaties—may overlap. I do not mean to suggest that they are coextensive. They are both created by the Constitution, and they are both subject to

the fundamental limitations that are imposed thereunder;[2] but the limitations that apply to the one do not necessarily apply to the other. The treaty power may extend to subjects that are beyond the legislative jurisdiction of Congress. *Missouri* v. *Holland*, 252 U.S. 416 (1920). Similarly, the President and the Senate may be powerless to accomplish by treaty what the Congress can accomplish by statute.

I shall elaborate briefly upon the latter point. Some lower courts[3] and many serious students of the law[4] have expressed the view that certain matters are subject to regulation by Congress only; and that a treaty, if it purports to deal with such a matter, can be given effect only to the extent that it may be authorized or implemented by statute. The two matters that are frequently mentioned in this regard are the raising of revenue and the appropriation of funds. The Constitution provides that "all" bills for raising revenue "shall" originate in the House (Article I, section 7, clause 1), and, further, that "no" money shall be drawn from the Treasury except in consequence of "appropriations" made by law (Article I, section 9, clause 7). In the face of these provisions the opinion expressed by some is that a treaty purporting to require the establishment or alteration of a revenue measure, or a treaty purporting to require an appropriation of funds, could not be effective, as a matter of domestic law, in the absence of statutory authorization or implementation. I find it unnecessary to deal with that issue in order to answer the question you have put to me.

I now turn to the question at hand.

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[2] In *Reid* v. *Covert*, 354 U.S. 1 (1957), Mr. Justice Black stated the applicable rule: "The prohibitions of the Constitution were designed to apply to all branches of the National Government," including the Congress, the Executive, and the Executive and Senate combined. *Id.* at 17–18.

[3] *See, e.g., Turner* v. *American Baptist Missionary Union*, 24 F. Cas. 344 (No. 14251) (C.C. Mich. 1852).

[4] John C. Calhoun was of opinion that a treaty could not authorize a withdrawal of funds from the Treasury. 29 *Annals of Congress* 531–32 (1818). In 1949 the Secretary of State, Dean Acheson, expressed the view a treaty could not put the United States into war. Only Congress could declare war. *Hearings on the North Atlantic Treaty Before the Senate Committee on Foreign Relations*, 81st Cong., 1st Sess., pt. 1, at 11 (1949). *See generally Henkin*, *supra*, note 1, at 188.

III.

The point of departure is the broad principle that was laid down in *Geofroy* v. *Riggs*, 133 U.S. 258 (1890), and was repeated in *Asakura* v. *City of Seattle*, 265 U.S. 332 (1924), to which I have alluded above: the treaty power extends to all proper subjects for negotiation between our Nation and others; and when a treaty purports to do so, it acts *ex proprio vigore*, without the aid of legislation, and is effective for all purposes, provided it does nothing that is forbidden by the Constitution.

Does the Constitution forbid the President and the Senate to make self-executing treaties disposing of territory or property belonging to the United States? I have taken note of the opinion, held by some, that the Constitution entrusts certain matters to Congress alone. In my opinion, however, the disposition of territory or property belonging to the United States is not such a matter. In my view, territory or property belonging to the United States may be disposed of by action of the President and the Senate under the treaty clause.

There are at least four considerations that support this conclusion, and I shall discuss them briefly below.

First, the fact that the Constitution gives Congress power to dispose of territory or property belonging to the United States does not suggest that the President and the Senate have no power to do so under the treaty clause. This was the implicit teaching of Marshall's decision in the *Peggy* and of the cases that followed. The existence of power in Congress does not imply an absence of power under the treaty clause. On the contrary, the one proposition of which we can be certain is that many of the powers that are given to Congress are shared by the President and the Senate when they act, under the treaty clause, to conclude and effectuate bona fide international agreements.

I think it follows that if one were to hold that the power to dispose of territory or property belonging to the United States resides in Congress alone and is distinguishable in that respect from the numerous powers that are shared, one would be obliged to find some basis for the distinction either in the text of the Constitution or in the history of the relevant provisions. I find none.

The language of Article IV, insofar as it confers upon Congress the power of disposition, is identical to the language of Article I, which confers upon Congress numerous powers that may be exercised by the President and the Senate through self-executing treaties. Article IV says that Congress "shall have power" to dispose of territory or property belonging to the United States, just as Article I says that Congress "shall have power" to regulate foreign commerce, to make rules governing captures on land and water, and so forth. Article IV goes on to say that Congress shall have power to make "all" needful rules and regulations respecting territory or property. As in the case of Article I, however, Article IV does not say that the powers it confers—the power to dispose of territory or property, and the power to make rules and regulations respecting it—shall reside in Congress alone.

The record of the proceedings during the Constitutional Convention supports the interpretation that is suggested by the language of the Constitution itself. The territory and property clause of Article IV was adopted during a general discussion of the role that the central government should play in connection with the territorial claims that had been asserted by the several States with respect to the western lands. In the course of the discussion there was no suggestion whatever that the purpose or effect of the clause was to give Congress exclusive power to authorize or implement international agreements disposing of territory or property. See 2 *M. Farrand, The Records of the Federal Convention of 1787* 457–59, 461–66 (rev'd ed. 1937) [hereinafter cited as *Farrand*].

The history of the treaty clause is even more conclusive. During the course of the convention several proposals were put forth. One would have required every treaty to be approved by both Houses of Congress. 2 *Ferrand, supra*, at 532, 538. That proposal was rejected. Another would have required the Senate to concur in treaties, but would have exempted peace treaties from that requirement, except for peace treaties depriving the United States of territory or territorial rights. 2 *Farrand, supra*, at 533–34, 543. That proposal was rejected as well. In its place, the convention

adopted a proposal that required the Senate to concur in *all* treaties.

It may be possible to interpret these actions in a different way, but the simplest and, for me, the most persuasive interpretation is this: the delegates to the convention assumed (1) that the treaty power could and would extend to questions of territory, and (2) that treaties, including treaties affecting rights in territory, could be effective in the absence of action by both Houses.[5]

This brings me to the third consideration that supports my basic conclusion. To the extent that the Supreme Court has spoken to the question, the Court has said that the President, with the concurrence of the Senate, may conclude a treaty disposing of territory or property belonging to the United States, and that such a treaty may convey good title to the territory or property in question. No act of Congress is required. *United States* v. *Brooks*, 10 How. 442 (1850); *Doe* v. *Wilson*, 23 How. 457 (1859); *Holden* v. *Joy*, 17 Wall. 211 (1872); *Best* v. *Polk*, 18 Wall. 112 (1873); *Francis* v. *Francis*, 203 U.S. 233 (1906). The dictum in *Holden* v. *Joy* is one of the clearest statements of this principle:

> [I]t is insisted that the President and Senate, in concluding such a treaty, could not lawfully covenant that a patent should be issued to convey lands which belonged to the United States without the consent of Congress, which cannot be admitted. On the contrary, there are many authorities where it is held that a treaty may convey a good title to such lands without an act of Congress conferring it. . . . [17 Wall. at 247].

I do not hold that these cases provide a sufficient answer to the question you have raised. They all involved Indian treaties and questions of "title" to real property. I do think, however, that the principle for which they stand is one of general application; that it bears upon your ques-

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[5] I should note that this very point was considered in the State conventions that were called to ratify the new Constitution. The objection was made that the treaty clause gave the President and the Senate power to alienate territory. The Virginia and North Carolina conventions proposed a remedial amendment that would have required every treaty ceding or compromising rights or claims of the United States in territory to be approved by three-fourths of the members of both Houses of Congress. 2 *Documentary History of the Constitution* 271, 382 (in *U.S. Cong. Doc. Ser.*, No. 4185); *see generally* S. Crandall, *Treaties Their Making and Enforcement* 220–21 (2d ed. 1916).

tion; and that it supports the conclusion I have reached. These cases, when viewed in light of the textual and historical considerations I have already mentioned, provide substantial support for the proposition that a treaty disposing of territory or property belonging to the United States may be self-executing. I find no cases to the contrary.

Finally, my conclusion is supported by historical practice. While I do not suggest that the commands of the Constitution may be attenuated by persistent practices not in conformity with them, I must observe that as a matter of historical fact the President and the Senate have made self-executing treaties disposing of territory or property belonging to or claimed by the United States.

I shall mention one rather clear example of the practice. Under the Florida Treaty with Spain (1819) the United States ceded all its territory beyond the Sabine River in Texas to Spain in return for the cession of the Spanish territories of East and West Florida. 8 Stat. 252, T.S. No. 327. While there had been some dispute over some of the relevant boundaries, the congressional debates, as well as President Monroe's annual message to Congress, make it clear that many considered the action to be an outright cession of American territory in exchange for Spanish territory. 36 *Annals of Congress* 1719–38, 1743–81; 2 *J. Richardson, Messages and Papers of the Presidents* 55 (1896). No statute authorizing the American cession was ever enacted.[6]

There have been a number of other treaties that have been self-executing insofar as they have disposed of territory or property belonging to the United States or have compromised a claim of the United States to property or territory claimed by a foreign power.[7] I do not believe that the validity of these treaties could be questioned today.

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[6] The self-executing effect of the *Spanish* cession was the subject of two decisions by the Supreme Court. *Foster* v. *Neilson*, 2 Pet. 253 (1829); *United States* v. *Arredondo* 6 Pet. 691 (1832). Congress did enact legislation authorizing the President to take possession of the Spanish cessions and to provide rules for their government. Act of March 3, 1819, c. XCIII, 3 Stat. 523, Act of March 3, 1821, c. XXXIX, 3 Stat. 637.

[7] *See, e.g.*, United States-Great Britain Treaty of 1842 (Webster-Ashburton), 8 Stat. 572, T.S. No. 119; United States-Great Britain Treaty in Regard to Limits Westward of the Rocky Mountains of 1846 (Oregon Treaty), 9 Stat. 869, T.S. No. 120.

IV.

In stating my opinion with respect to the question you have raised, I have taken note of general principles that bear upon the relation between congressional power and the power of the President and the Senate under the treaty clause; but I have no occasion to express an opinion with respect to any other questions that may arise in that context, and I express none.

Sincerely,

GRIFFIN B. BELL.

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OPINION OF THE ATTORNEY GENERAL OF THE UNITED STATES

SECRETARY OF HEALTH, EDUCATION, AND WELFARE, AND SECRETARY OF AGRICULTURE—AUTHORITY UNDER THE FEDERAL FOOD, DRUG AND COSMETIC ACT, MEAT INSPECTION ACT, AND POULTRY PRODUCTS INSPECTION ACT, TO AUTHORIZE CONTINUED USE OF NITRITES AS FOOD ADDITIVES.

The central purposes of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 301-392, the Meat Inspection Act, 21 U.S.C. 601-695, and the Poultry Products Inspection Act, 21 U.S.C. 451-470, are the prevention of the adulteration of food and the introduction into or receipt in interstate commerce of adulterated food.

Food additives, if not exempted by 21 U.S.C. 321(s)(4), and color additives are subject to the Delaney Clause, 21 U.S.C. 348(c)(A), which provides that an additive shall be deemed unsafe if it is found to be a carcinogen.

In determining whether addition of nitrites adulterates food under the Meat Act or the Poultry Act, the Secretary of Agriculture may not balance the beneficial effects of nitrites against their possible carcinogenic properties. 21 U.S.C. 453(g)(1), 2(A), (3); 601(m)(1), (2)(A), (3).

If the Secretary of Health, Education, and Welfare determines that the addition of nitrites adulterates food within the meaning of the Food and Drug Act, he may not use his enforcement discretion to authorize continued use of nitrites during a gradual phase-out period. 21 U.S.C. 348, 371(a).

Balancing of competing health risks under the Food and Drug Act is a matter for the Congress.

If the Secretaries of Health, Education, and Welfare, and Agriculture, find that nitrites are carcinogens, they have the discretion to adopt timetables and procedures to assure the orderly removal of the nitrites from commerce.

MARCH 30, 1979.

THE SECRETARY, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
THE SECRETARY, DEPARTMENT OF AGRICULTURE

GENTLEMEN: This letter responds to your requests for the opinion of the Department of Justice with respect to the continued presence of sodium and potassium nitrite in food

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products regulated by your Departments. You advised me that certain private studies indicate that nitrites have been found to cause cancer in laboratory animals. I understand that neither Department has yet concluded that these studies are in fact accurate, and that, in advance of making any such finding, both Departments would undertake a thorough, independent examination of the question and would provide ample opportunity for public comment by interested parties. The responsibility and the authority to decide whether nitrites are in fact carcinogenic rest exclusively with your two Departments. The question you have posed is whether—assuming that you eventually find that nitrites do induce cancer in man or animal—you are authorized under applicable law to adopt an extended procedure for phasing out the use of nitrites over whatever time period may be necessary to develop a feasible substitute.

As you know, I have asked the Office of Legal Counsel for its views on this question. Enclosed you will find a memorandum to me from John Harmon, the Assistant Attorney General in charge of that Office, in which he examines the relevant statutes in some detail. He has carefully considered your written submissions and your comments in the meetings we have had on this question. His conclusion, with which I agree, is that at bottom the issue you have raised is one of construing and applying the will of Congress as expressed in the statutes that govern food and color additives. This is the essence of the Executive's duty under the Constitution to "take care that the laws be faithfully executed."

Upon a close evaluation it now appears clear that your Departments do possess some discretion to fashion appropriate procedures and timetables for complying with the pertinent statutes. The critical question, however, is whether in so doing, you have the discretion to consider and rely upon the assertion that, in addition to whatever carcinogenic properties nitrites may possess, they also have the salutary effect of combating the growth of botulism as a basis for postponing the prohibition against their use until a feasible substitute can be found. For the reasons stated in the memorandum, I conclude that Congress has not given either of your Departments this prerogative.

We have found no evidence in the pertinent statutes or legislative history that Congress intended to authorize your respective Departments to weigh the positive effects against the carcinogenic or other injurious effects of additives and determine that those additives will not be banned, at least not until a feasible substitute can be developed and put in place; to the contrary, there is substantial evidence that Congress reserved that authority exclusively to itself. Upon a finding by your Departments that a substance is carcinogenic, the statutes contemplate that Congress will make the ultimate determination whether its continued use will be permitted.

I would like to emphasize that, as this question is one of statutory construction, Congress is free to change its command to your Departments. I understand that you are preparing to submit a proposal on this matter to Congress, and I wish to make clear that nothing in this opinion should be read as opposing such a solution.

Sincerely,

GRIFFIN B. BELL.

Enclosure

MARCH 30, 1979.

MEMORANDUM FOR THE ATTORNEY GENERAL

Re: Proposed Phasing Out of Nitrites in Foods

You have asked this Office to consider inquiries by the Secretaries of Agriculture and of Health, Education, and Welfare (HEW) whether either may provide for the gradual phasing out over a period of years of the use of sodium and potassium nitrites in foods until such time as a feasible substitute is developed. It appears that a ban on the use of nitrites might be mandated in the foreseeably near future because of health standards made applicable to nitrites by the Federal Food, Drug and Cosmetic Act [Food and Drug Act], 21 U.S.C. §§ 301-392; Meat Inspection Act [Meat Act], 21 U.S.C. § 601-695 (1976); and the Poultry Products Inspection Act [Poultry Act], 21 U.S.C. §§ 451-470 (1976).

The Acting Secretary of Agriculture inquired in a letter to you whether the ban may be inapplicable in this case

because nitrites also affect food in a way that is beneficial to health. The Secretary of HEW has asked whether the applicability of the standards notwithstanding, he has discretion, as a matter of administrative enforcement, to permit phasing out instead of a ban because of nitrites' beneficial effect. As we explain in detail below, it is our conclusion that an extended or indefinite period of phasing out nitrite use is not permissible under either of these theories.

I. Applicability of Statutes

The Secretaries' inquiry arose because of test results they have received that suggest that nitrites induce cancer in laboratory animals. These results, if confirmed, would call into question the safety of the continued use of nitrites in foods.[1]

The Food and Drug, Meat, and Poultry Acts cited above determine the relevance of the Secretaries' information concerning cancer to their regulation of nitrites. Depending on the use of nitrites in question, nitrites might fall within the definitions of unsafe "food additive" or "color additive" under the Food and Drug Act, 21 U.S.C. § 321(s)-(t)(1976), which, for purposes relevant to this inquiry, are imported into the Poultry and Meat Acts, as well. Nitrites are subject to other standards under these Acts, even if they do not fall within these definitions. 21 U.S.C. § 453(g)(2)(C)-(D); 21 U.S.C. § 601(m)(2)(C)-(D) 1976).

Central purposes of all three acts are the prevention of the adulteration of food, and the introduction into or receipt in interstate commerce of adulterated food. *See* Food and Drug Act, 21 U.S.C. §§ 331(a)-(c), 332-334(1976); Meat Act,

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[1] As is this Office's traditional practice, we have limited our factual review in this memorandum according to the standards applicable to formal opinions of the Attorney General. Consequently, we do not purport to resolve any questions of fact that may underlie the present inquiry. *See* 6 Op. Att'y. Gen. 326, 334 (1854). It is properly for the Departments of Agriculture and of HEW, in matters within their respective jurisdictions, to determine whether nitrites do induce cancer in laboratory animals, whether they have the beneficial effects discussed below in preventing the development of *Clostridium botulinum*, and whether nitrites, under the applicable legal standards, adulterate food to which they are added. Other questions, such as whether the use of nitrites in meat or poultry products was sanctioned by the Department of Agriculture prior to 1958 and whether nitrites constitute "color additives," are involved in ongoing litigation, and it would similarly be inappropriate to discuss them in our memorandum. *See, e.g.*, 41 Op. Att'y. Gen. 266, 272(1956); 32 Op. Att'y. Gen. 472, 473(1921). This memorandum, therefore, must not be viewed as suggesting any final determination on any of the issues mentioned above, on which members of the public may still have an opportunity to comment or, in certain circumstances, to request a hearing. We shall, however, make certain necessary assumptions regarding the factual and legal issues mentioned in order to address fully the questions raised by the Secretaries.

21 U.S.C. §§ 601(m), 602-606, 608, 610, 624, 672-676 (1976); and Poultry Act, 21 U.S.C. §§ 451-452, 453(g), 455-456, 457(a), 458, 461, 463, 466, 467a-c (1976).

The Food and Drug Act provides in 21 U.S.C. § 342 (1976) that a food shall be deemed to be adulterated if, *inter alia*, it bears or contains an unsafe "food additive" or "color additive;" it bears or contains any poisonous or deleterious substance which may render it injurious to health; or it consists in whole or in part of any filthy, putrid, or decomposed substance or is otherwise unfit for food. Both the Poultry and Meat Acts contain standards of adulteration largely similar to those contained in the Food and Drug Act. 21 U.S.C. §§ 453(g), 601(m) (1976). Thus, food that contains nitrites would be adulterated under these Acts if nitrites are unsafe food or color additives, or, otherwise, substances "injurious to health."

A. Food and Color Additives

Food additives are defined under 21 U.S.C. § 321(s) (1976). A food additive is deemed to be unsafe with respect to any particular use unless: "there is in effect, and it and its use or intended use are in conformity with, a regulation issued under this section prescribing the conditions under which such additive may be safely used." 21 U.S.C. § 348(a)(2) (1976). In determining whether a proposed use of an additive is safe, and thus, the conditions under which an additive may be safely used, the Secretary of HEW is to consider, among other relevant factors, the probable consumption of the additive, the cumulative effect of the additive in the diet, and safety factors generally recognized as appropriate for the use of animal experimentation data. 21 U.S.C. § 348(c)(5) (1976). However, the so-called Delaney Clause, 21 U.S.C. § 348(c)(3)(A) (1976), provides that an additive shall be deemed to be unsafe if it is found to induce cancer when ingested by man or animal, or if it is found after appropriate tests to induce cancer in man or animal. Thus, if nitrites are food affitives under the Food and Drug Act, and if it is found after appropriate tests that nitrites induce cancer in man or animal, then nitrites are unsafe food additives. Consequently, no regulation for their safe use may issue, and food containing nitrites is adulterated within the meaning of "adulteration" under the Food and Drug, Meat, or Poultry Acts.

The Color Additive Amendment, 21 U.S.C. § 376 (1976), contains provisions similar to those for food additives, for determining the safety of additives, including an anticancer proviso. 21 U.S.C. § 376(b)(5)(B) (1976). The term "color additive" is defined broadly to include any substance which, "when added or applied to a food . . . is capable (alone or through reaction with other substance) of imparting color thereto," 21 U.S.C. § 321(t)(1)(B) (1976), but "does not include any material which the Secretary, by regulation, determines is used (or intended to be used) solely for a purpose or purposes other than coloring." 21 U.S.C. § 321(t)(1) (1976).

Although the operative definition of the term "food additive" is broad enough in general to embrace nitrites, Congress excluded from the general definitions of food additive "any substance used in accordance with a sanction or approval granted" pursuant to the Food and Drug, Meat, or Poultry Acts prior to the date of enactment of the Food Additives Amendment of 1958, Pub. L. No. 85-929, 72 Stat. 1784 (codified at 21 U.S.C. § 321(s)(4) (1976)). The quoted language is a type of grandfather clause which exempts from the definition of food additive, and thus, from the Delaney Clause, substances granted a sanction or approval prior to September 6, 1958, under any of the three acts and the other safety standards contained in 21 U.S.C. § 348 (1976). However, a substance that is not a "food additive" for a particular use because of a prior sanction or approval must still be judged against the more general adulteration standards in the Food and Drug, Meat, or Poultry Acts. In contrast, there is no exclusion from the definition of "color additive" for substances which received a prior sanction or approval by the Department of Agriculture (USDA) or the Food and Drug Administration (FDA). The anticancer proviso for color additives, 21 U.S.C. § 376(b)(5)(B) (1976), thus applies to all color additives, whether or not they were also approved as food additives, and thus exempted from the Delaney Clause.

Thus, for uses of nitrites not having a prior sanction or approval under the Food Additives Amendment, it would make little difference for present purposes whether nitrites were regarded as food additives or color additives (or both).

these uses would be subject to an anticancer clause in either event. On the other hand, if nitrites are color additives in meat products, they would be subject to the anticancer proviso of the Color Additive Amendment despite any prior sanction or approval under the Food Additives Amendment.

B. Standards Applicable to Nitrites

Before considering the applicability of the standards just discussed to nitrites, it must be noted that the classification of nitrites under the relevant Acts is itself a matter of dispute.

USDA has advised the FDA that it granted a prior sanction for the use of nitrites in cured red meat products under the Meat Act. *See* 9 C.F.R. §§ 317.8(b)(6), 318.7(c)(4) 1978). However, the conclusion that the use of nitrites in red meat enjoys a prior sanction by USDA has been challenged in the case of *Public Citizen* v. *Foreman*, Civ. No. 78-1064 (D.D.C., filed June 12, 1978), in which plaintiffs seek a declaratory judgment that the USDA regulation requiring the addition of certain amounts of nitrites to bacon is unlawful. *See* 9 C.F.R. 318.7(b), (c)(4)(1978), *as amended*, 43 Fed. Reg. 20,992 (1978), *and clarified*, 43 Fed. Reg. 32,136 (1978).

Conversely, although current USDA regulations permit the use of nitrites to fix color in cured poultry products and to inhibit corrosion on the exterior of canned goods, 9 C.F.R. § 381. 147 (1978), USDA has concluded that a sanction or approval for such uses did not exist under the Poultry Act, prior to September 6, 1958. USDA's conclusion that the addition of nitrites to poultry products does not enjoy a prior sanction has been challenged in the case of *Tysons Food, Inc.* v. *United States Department of Agriculture*, Civ. No. F-77-5059 (W.D. Ark., filed Nov. 2, 1977).

Because it would not be appropriate for you to render an opinion on the prior sanction question in view of the pending litigation, this memorandum will assume that the use of nitrites in cured meat products does enjoy a valid prior sanction within the meaning of 21 U.S.C. § 321(s)(4) (1976) but that use of nitrites in poultry products does not. We shall therefore further assume that nitrites are "food additives" in poultry—as well as in smoked fish, where its use is

permitted by an existing food additive regulation — subject to the Delaney Clause.

The Government has further taken the position in *Public Citizen* that the nitrites are not color additives when used in curing bacon because the effect of nitrites is to fix or preserve the natural red color, not to "impart" color to the bacon within the meaning of 21 U.S.C. § 321(t)(1)(1976), and because the color effect of nitrites is merely incidental to the primary antimicrobial or preservative function. Because the application of the color additive provisions to processed read meat is involved in the pending litigation relating to bacon, we will not address that issue here. This memorandum will proceed on the assumption that nitrites would not have to be considered as color additives in processed red meat during the suggested phasing out of nitrite use and would therefore not be subject to the anticancer proviso of the Color Additive Amendment or the Food Additives Amendment.

II. Health Benefits from Nitrites

The immediate problem posed, against the statutory background just outlined, is that nitrites, when added to food, may have an effect beneficial to health. Specifically, nitrites inhibit the development of the spore-forming bacterium, *Clostridium botulinum*, and its toxin, botulin, the direct cause of the acute and frequently fatal food poisoning botulism. Indeed, it is the Secretaries' opinion that the addition of nitrites to certain foods is the only currently available, economically feasible way of satisfactorily controlling the risk of botulism attendant to the consumption of certain processed red meat and poultry products and smoked fish. They have advanced the possibility of a gradual phasing out of nitrites in these products, rather than an immediate ban, in order to permit the continued use of nitrites for this beneficial purpose. Phasing out nitrite use, they suggest, would allow time for the development of alternative means of inhibiting the growth of *Clostridium botulinum* in these products without disrupting the Nation's food supply, of which processed read meat and poultry products constitute some seven percent.[2]

[2] The Secretaries are apparently of the view that nitrites are not essential for inhibiting the

(Continued on next page)

The Secretaries have advanced somewhat differing legal theories for phasing out the use of nitrites in those products in which they believe the continued use of nitrites is warranted, subject to their respective regulatory jurisdictions. In her letter of August 22, 1978, the Acting Secretary of Agriculture suggested that USDA may properly consider, in determining whether meat to which nitrites are added is adulterated under the Meat Act, the benefits of nitrites in preventing the growth of *Clostridium botulinum*. Letter from Carol Tucker Foreman, Acting Secretary of Agriculture, to Griffin B. Bell, Attorney General, (August 22, 1978). If benefits may be weighed against or offset possible harmful effects in this manner, USDA might conclude that certain levels of nitrites do not adulterate meat despite their possible carcinogenic characteristics. If meat is not adulterated by nitrites, there would be no legal requirement to ban its use. Accordingly, under this theory, the level of nitrites in cured meats could be reduced over a period of time as substitutes were developed.

On the other hand, although the Secretary of HEW concedes that nitrites adulterate foods, he suggests that phasing out is permissible as a matter of discretionary enforcement. The Secretary of HEW concedes that benefits may not be weighed against indicated carcinogenic properties with respect to meat under the Delaney Clause. However, the Secretary urges that the Food and Drug Administration (FDA) could continue as a matter of enforcement discretion, to balance all health-related factors and permit nitrites in foods under its jurisdiction in order to prevent the risk of botulism.

III. Suggested Phasing Out

A. USDA phasing out of use of nitrites in red meat products

Although we assume, for purposes of this memorandum, that nitrites are not food additives or color additives when used in red meat—and therefore do not automatically render meat adulterated if found to induce cancer when ingested by man or animal—the use of nitrites must still be

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growth of *Clostridium botulinum* in other contexts, such as in home cures and pet foods and as an "indirect food additive" which may be added to food as a result of its use in articles that contact the food. They, therefore, propose to ban nitrites for those uses as soon as possible. *See* 21 C.F.R. § 174.5(a)(1) (1978).

judged against the more general adulteration standards in the Meat Act. A meat is adulterated under that Act if it bears any added poisonous or deleterious substance that may render it "injurious to health" or if it consists in whole or in part of any filthy, putrid, or decomposed substance or is for any other reason unsound, unhealthful, unwholesome, or otherwise unfit for human food. 21 U.S.C. § 601(m)(3).[3]

In her letter of August 22, the Acting Secretary of Agriculture states that there are no other substances that could be used on a sufficiently broad scale at the present time to prevent botulism in commercially processed meat, and that the consumption of such products as hot dogs and ham would pose severe health hazards unless botulism could be prevented. She therefore suggests that permitting the possible harmful effects of nitrites to be balanced against their beneficial effects in preventing botulism in determining whether their addition causes meat products to be adulterated accords with the overriding purpose of the Meat Act of protecting the public health. Although these health concerns are significant, this approach would not be consistent with the requirements of the Meat Act.

The Acting Secretary informed you that USDA regards nitrites, because of their indicated carcinogenicity, to be poisonous and deleterious substances. A finding that the substance may render meat "injurious to health" is an essential element of the adulteration standard under 21 U.S.C. § 601(m)(1) (1976). *See United States* v. *Lexington Mill & Elevator Co.*, 232 U.S. 399 (1914). We thus assume that if only the indicated carcinogenic or harmful effects of nitrites were considered, the Secretary of Agriculture would conclude that nitrites may render meat "injurious to health" and that they therefore adulterate meat. Nothing on the face of 21 U.S.C. § 601(m)(1) (1976) suggests that concededly injurious properties of a substance may be

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[3] As explained above, we have assumed that the use of nitrites in poultry and poultry products does not enjoy a prior sanction exempting that use from the definition of the term "food additive." Thus, if FDA determines that nitrites are unsafe food additives, this will automatically render poultry and poultry products to which they are added adulterated. 21 U.S.C. § 453(g)(2)(C) (1976), without reference to the more general adulteration standards in the Poultry Act which are identical to those in the Meat Act discussed in the text. 21 U.S.C. § 453(g)(1), (2)(A), (3) (1976). If nitrites used in poultry products are found to enjoy a prior sanction, the discussion in the text would be relevant to a determination whether nitrites adulterate poultry under the more general adulteration standards in the Poultry Act, which were revised in 1968 to conform to the comparable provisions of the Meat Act.

ignored, forgiven, or offset by its health-related benefits in this fashion. The ordinary meaning of the word "injurious" is "harmful, hurtful, or detrimental." *Random House Dictionary of the English Language* 732 (1966). The capacity of nitrites to cause cancer or other injury, which we assumed for purposes of this memorandum, would presumably be unaffected by a reduced incidence of botulism. Giving the statutory language its ordinary meaning, then, unrelated benefits resulting from the presence of a substance would appear to be irrelevant.

The Supreme Court considered the meaning of language comparable to that now contained in section 601(m)(1) in *Lexington Mill & Elevator Co.*, which concerned whether nitrites or nitrite-reacting material or other poisonous or deleterious substances adulterated flour under section 7 of the Food and Drug Act of 1906, 34 Stat. 769, on the ground that these substances "may" have rendered the flour "injurious to health:"[4]

> In thus describing the offense Congress doubtless took into consideration that flour may be used in many ways, in bread, cake, gravy, broth, etc. It may be consumed, when prepared as a food, by the strong and the weak, the old and the young, the well and the sick; and it is intended that if any flour, because of any added poisonous or other deleterious ingredient, may possibly injure the health of any of these, it shall come within the ban of the statute. If it cannot by any possibility, when the facts are reasonably considered, injure the health of any consumer, such flour, though having a small addition of poisonous or deleterious ingredients, may not be condemned under the Act.
> 232 U.S. at 411.

The Court's discussion, like the language of 21 U.S.C. § 601(m)(1) (1976), appears to attach significance only to the direct detrimental impact of the food additive. It was not considered whether food additives that may "come within the ban of the statute" because it "may possibly injure the health" of "any consumer" may be removed from the ban

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[4] The standard of adulteration involved in *Lexington Mill* was carried forward in the Food and Drug Act, 21 U.S.C. § 342(a)(1) (1976). *Flemming* v. *Florida Citrus Exchange*, 358 U.S. 153, 161 (1958). The adulteration provisions of the Meat Act were expressly patterned after those in the Food and Drug Act. S. Rep. No. 799, 90th Cong., 1st Sess. 6-7 (1967). We may assume, therefore, that the discussion in *Lexington Mill* applies equally to the essentially similar language in 21 U.S.C. § 601(m)(1) (1976).

of the statute if distinct health-related benefits of an added substance are discovered—here, benefits that may well accrue to persons other than those who might contract cancer.

The suggested balancing of benefit and harm must also be placed in proper perspective. The current method of preserving red meats through the use of nitrites is apparently of long standing, and is relied upon by industry and consumers. Nonetheless, it is important to emphasize that the risk of botulism with which we are here concerned is occasioned by the manner in which the industry chooses to prepare, distribute, and market processed meat; it is not an independently created health risk.

No indication appears in the legislative history of 21 U.S.C. § 601(m)(1) (1976) or in the extensive legislative history of 21 U.S.C. § 342(a)(1) (1976) of the Food and Drug Act, after which section 601(m)(1) of the Meat Act was patterned, that the beneficial effects of a substance may be taken into account in the fashion suggested by USDA. The structure and background of this section of the Food and Drug Act, in fact, point to just the opposite conclusion.

The Food and Drug Act placed stringent restrictions on the addition of substances to food. Under the provisions of 21 U.S.C. §§ 342(a)(2), 346, a food containing any added poisonous or deleterious substance was adulterated unless the Secretary concluded that the substance was "required in the production" of the food or "cannot be avoided by good manufacturing practice." In that event, the Secretary was required to establish tolerances for the substance "to such extent as he finds necessary for the protection of public health," taking into account the degree to which the substance is "required" or "cannot be avoided" and the other ways in which the consumer may be affected by the same or other poisonous or deleterious substances.

The provision permitting tolerances for substances that could not be avoided by good manufacturing practice applies to contaminants or other substances that may unavoidably be added to food in the production process, *see, e.g.*, S. Rep. No. 361, 74th Cong., 1st Sess. 5-6 (1935), and is of little relevance here. The authorization of tolerances for added substances required in the production of food was designed to permit some residue of toxic insecticides and

fungicides on agricultural products because of Congress' belief that "an adequate fruit and vegetable supply could not be brought to maturity without the use of toxic insecticides or fungicides." H.R. Rep. No. 2139, 75th Cong., 3d Sess. 6 (1938). The expected operation of the section was explained as follows:

> This authorization will permit the establishment of comparatively liberal tolerances for any food where poison is unavoidable or is required by the necessities of production, and less liberal tolerances or complete prohibitions where it is practicable to limit the amount of poison in a particular food to very small quantities, or to eliminate it completely. It will likewise afford adequate control of those situations where irresponsible manufacturers, for some fancied or real commercial advantage, add dangerously toxic substances to foods, as, for example, the addition of maleic acid to fats and oils to prevent rancidity when preservation can be accomplished by observance of sanitary conditions in manufacture and packaging and by use of refrigeration for the finished product.
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> In approaching the problem of control from this angle the amount of added poisons can be so allocated to different foods, in accordance with the practical necessities, that on the basis of the probable consumption of the various foods consumers will not receive an aggregate quantity of poisons sufficient to jeopardize health.
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> S. Rep. No. 493, 73d Cong., 2d Sess. 4 (1934).

Thus, under the Food and Drug Act as enacted in 1938, Congress expressly provided a mechanism and standards for allowing poisonous and deleterious substances to be added to food. This section contemplated the consideration of the beneficial effects of pesticides, for example, in ensuring an adequate food supply.[5] Even then, however, added substances could not be permitted in a manner that jeopardized public health.

The existence and background of section 346 strongly suggests that beneficial effects of an added substance cannot be considered under another section of the Food and

[5] Because our basic concern here is with the Meat Act, we need not consider whether the authority under section 346(a) of the Food and Drug Act to establish tolerances for a substance required in the "production" of food would extend to tolerances for a substance added at the processing stage for preservation purposes, as is the case with nitrites.

Drug Act, 21 U.S.C. § 342(a)(1), which does not contain express authorization or standards for doing so and is, in fact, written in terms which suggest that only detrimental effects may be considered, particularly if there would be a risk to the public health as a result of the addition of nitrites.[6] Because the Meat Act, 21 U.S.C. § 601(m)(1)(1976), was drawn directly from section 342(a)(1) of the Food and Drug Act, the conclusion—drawn from the structure and legislative history of the Food and Drug Act—that possible detrimental effects cannot be balanced against beneficial effects would appear to apply equally to that section.

Finally, no significant administrative or judicial precedent appears to support such a balancing approach. Indeed, the opinion in *Schuck* v. *Butz*, 500 F.2d 810 (D.C. Cir. 1974) suggests just the opposite conclusion. In *Schuck*, the plaintiffs sought to require the Secretary of Agriculture to ban the addition of sodium nitrate and sodium nitrite to meat products on the ground that their alleged carcinogenic characteristics rendered the meat adulterated under section 601(m)(1). After express reference to USDA's view that these substances prevent the development of *Clostridium botulinum*, 500 F.2d at 811 n. 5, the court noted with seeming approval:

> . . . the Department's apparent acceptance, on appeal, of appellant's assertions that possible beneficial effects are not relevant to a determination whether a product is adulterated, and that the proper standard of proof is whether there is convincing evidence that the product "contains any poisonous or deleterious substance which *may* render it injurious to health." 21 U.S.C. § 601(m)(1) (emphasis added).

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[6] Under the Food Additives Amendment of 1958, the finding that an additive is safe "requires proof of a reasonable certainty that no harm will result from the proposed use of an additive." S. Rep. No. 2422, 85th Cong., 2d Sess. 6 (1958). Also, the Secretary is permitted by the Food Additives Amendment to establish a tolerance for an added substance at a level no higher than that required to "accomplish the [intended] physical or other technical effect." 21 U.S.C. § 348(c)(4)(A)(1976). The last-quoted phrase "refers to the objective effect which the additive may have on the appearance, flavor, texture, or other aspects of a food. The question of whether an additive produces such effect . . . is a factual one, *and does not involve any judgment on the part of the Secretary of whether such effect results in any added 'value' to the consumer* . . . ." S. Rep. No. 2422, *supra* at 7 (emphasis added.)

Thus, in 1958, Congress expressly limited the safety determination to a consideration of whether harm would result and likewise prohibited the Secretary of HEW (through FDA) from making the difficult value judgments that would be required under a balancing approach. There is no indication that these requirements were viewed as departures from prior law.

500 F.2d at 812 n. 6.[7] *Cf. Community Nutrition Institute* v. *Butz*, 420 F. Supp. 751, 755-56 (D.D. C. 1976).

USDA has concluded that there are no substances aside from nitrites and nitrates and no processes which could be used on a sufficiently broad scale at the present time to prevent botulism in commercially processed meat products, and that, without nitrites and nitrates, common usage of products such as hot dogs or ham would not be possible without severe health hazards. These factors, cannot, however, alter the legal conclusion, which we believe clearly to be required.

For the foregoing reasons, we conclude that the Secretary of Agriculture may not balance the beneficial effects of nitrites and nitrates against their possible carcinogenic properties in determining whether these substances may render meat products injurious to health under 21 U.S.C. § 601(m)(1) (1976). We are unaware also of any basis for interpreting 21 U.S.C. §§ 601(m)(2) (A) or 601(m)(3) to authorize the Secretary to conclude that a substance which would be deemed to render meat unsound, unhealthful, unwholesome, or unfit for food based on its harmful effects is nevertheless not adulterated because of apparent beneficial effects.

If the Secretary determines that nitrites adulterate meat, he would be obliged to revoke existing regulations authorizing their use and to take appropriate enforcement action if nitrites continue to be added after that time. *Community Nutrition Institute* v. *Butz*, 420 F. Supp. at 757.

B. Phasing out in products under FDA jurisdiction by exercise of enforcement discretion

The Secretary of HEW, acting through the Commissioner of FDA, proposes, should he finally determine that the addition of nitrites adulterates foods under his jurisdiction within the meaning of the Food and Drug Act, to exercise enforcement discretion to permit nitrites to be added to these foods over the period of gradual and indefinite phasing out of their use.

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[7] The court affirmed the grant of summary judgment in favor of the Secretary noting that the proper procedure for the plaintiffs to follow was to petition the Secretary to initiate rulemaking proceedings under 7 C.F.R. § 1.27 (1977) to repeal the USDA regulation permitting the addition of nitrate and nitrite to fix color in red meat.

The proposed exercise of enforcement discretion by the Commissioner could presumably be effective only with respect to products other than meat and poultry subject to the Meat and Poultry Act. The Secretary of Agriculture is responsible for enforcing the latter two acts in the course of the mandatory inspections of meat and poultry carcasses and products. Any meat or poultry products that are found after inspection to be adulterated "shall be condemned and destroyed." 21 U.S.C. §§ 455(c), 604 (1976). This would appear to be a clear and mandatory duty,[8] leaving little room for the exercise of discretion to permit adulterated products to enter commerce.[9] *See also* 21 U.S.C. §§ 452, 602 (1976); *compare Kendall* v. *United States*, 37 U.S. (12 Pet.) 524, 613 (1838); *National Treasury Employees Union* v. *Nixon*, 492 F.2d 587 (D.C. Cir. 1974). Any exercise of enforcement discretion by FDA would likewise not appear to excuse USDA from these mandatory duties.[10]

If evidence is presented or comes to the attention of the Secretary indicating that a food additive currently permitted under existing regulations is unsafe, the Secretary must initiate proceedings to amend or repeal those regulations. 21 U.S.C. § 348(b), (d), (h) (1976). *See also* 104 Cong. Rec. 17,421 (1958). We are informed that FDA intends, based on the evidence of the carcinogenicity of nitrites, to initiate proceedings to revoke existing food additive regulations authorizing their addition in certain products.

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[8] In addition, 21 U.S.C. § 604 (1976) requires that any meat product found not to be adulterated be stamped "Inspected and passed," and any product found to be adulterated be stamped "Inspected and condemned." The exercise of enforcement discretion by USDA would therefore also require the inspector to ignore these statutory labeling requirements.

[9] We need not consider here whether, notwithstanding the inspection, condemnation, and destruction requirements, the Secretary of Agriculture has implied authority—derived from his authority to decline to refer minor violations of the acts, 21 U.S.C. §§ 462, 676(b) (1976), or elsewhere—to set tolerance limits for *de minimus* or technical adulteration of poultry or meat products under 21 U.S.C. §§ 453(g)(3)-(4) and 601(3)-(4) (1976). *See, e.g., United States* v. *Ewig Bros. Co. Inc.*, 502 F.2d 715, 720 (7th Cir. 1974) (Stevens, J.) *Cert. denied*, 420 U.S. 945 (1975), and cases cited. For reasons set forth later in this opinion, if nitrites are determined to be unsafe food or color additives or otherwise to adulterate food because of possible carcinogenic properties, their widespread continued use could likely not be considered mere minor or technical violations, and USDA would apparently not regard them as such.

[10] The discussion that follows regarding FDA's enforcement discretion would cast considerable doubt on the ability of the Secretary of Agriculture to permit the continued addition of nitrites to meat and poultry products even in the absence of the statutory requirement that adulterated meat and poultry products be condemned and destroyed. *See also Certified Color Manufacturers Ass'n* v. *Mathews*, 543 F.2d 284, 297-98 (D.C. Cir. 1976); *EDF* v. *EPA*, 510 F.2d 1292, 1302 (D.C. Cir. 1975); *EDF* v. *Ruckelshaus*, 439 F.2d 584, 596 n. 41 (D.C. Cir. 1971); *EDF* v. *HEW*, 428 F.2d 1083, 1091-92 (D.C. Cir. 1970).

If it determines as a result of this process that nitrites are an unsafe food additive, FDA, to implement the proposed phasing out of nitrites, would replace these food additives regulations with regulations specifying the schedule and details of the suggested "phase-out" of the use of nitrites, which, in effect will permit the continued addition of nitrites until a feasible substitute is developed. These regulations would not be food additive regulations, but a formalization of FDA's enforcement policy. They would be issued on the authority of 21 U.S.C. § 371 (1976), which provides for the Secretary to issue regulations for the efficient enforcement of the Act, and under the authority of 21 U.S.C. § 342 (1976), the adulteration section. The "phase-out" regulations, as prepared by FDA, would be designed to permit the addition of nitrites up to the level deemed necessary to prevent the development of *Clostridium botulinum* until the time that feasible alternative methods of prevention are developed.

For the reasons that follow, we do not believe that the proposed phasing out through the withholding of enforcement is consistent with the Secretary's obligations under the Act.

As discussed earlier, 21 U.S.C. § 348(c)(3) (1976) provides that no food additive regulation shall issue (or, by implication, remain in effect) if a fair evaluation of the data before the Commissioner fails to establish that the proposed use of the additive will be safe. The safety determination "requires proof to a reasonable certainty that no harm will result from the proposed use of an additive," S. Rep. No. 2422, 85th Cong., 2d Sess. 6 (1958), and does not permit harmful effects to be offset by beneficial effects. In addition, Congress chose to treat potentially carcinogenic substances with extreme caution by enacting the Delaney Clause, which prohibits the Secretary from establishing tolerances for any substance found to induce cancer when ingested by man or animal. Such a substance is therefore unsafe in whatever amount it may be added.

The immediate legislative history of the Delaney Clause of the Food Additives Amendment itself is somewhat sparse. However, the Secretary of HEW explained the reasoning for the absolute ban on carcinogenic substances during his testimony in 1960—less than two years after passage of the

Food Additive Amendment—relating to a proposal to include the similar clause in the Color Additive Amendment.

> Our advocacy of the anticancer proviso in the proposed color additives amendment is based on the simple fact that no one knows how to set a safe tolerance for substances in human foods when these substances are known to cause cancer when added to the diet of animals . . . .
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> * * *
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> Unless and until there is a sound scientific basis for the establishment of tolerances for carcinogens, I believe the Government has a duty to make clear—*in law as well as in administrative policy*—that it will do everyting possible to put persons in a position where they will not unnecessarily be adding residues of carcinogens to their diet.
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> * * *
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> *Whenever a sound scientific basis is developed for the establishment of tolerances for carcinogens, we will request the Congress to give us that authority. We believe, however, that the issue is so important that the elected representatives of the people should have the opportunity of examining the evidence and determining whether or not the authority should be granted to the executive branch.*
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> *Hearings on Color Additives before the House Committee on Interstate and Foreign Commerce*, 86th Cong., 2d Sess. 61 (1960) [hereafter, cited as "Color Additive Hearing"]. *See also id.* at 500-01.[11]

This defense by the Secretary of the principle embodied in the Delaney Clause was quoted in the report of the House Interstate and Foreign Commerce Committee and relied

[11] The absence of a scientific basis for establishing tolerances for carcinogenic substances was also given, in a paper inserted in the Congressional Record by Representative Delaney shortly after the House in 1958 passed the food additive bill containing the Delaney Clause, as a reason for supporting a ban on carcinogenic additives. 104 Cong. Rec. A7738-7740 (1958) (Remarks of Representative Delaney). *See also EDF* v. *HEW*, 428 F.2d 1083, 1091 (D.C. Cir. 1970).

upon by the Committee to support its decision to include a similar clause in the Color Additive Amendment. H.R. Rep. No. 1761, 86th Cong., 2d Sess. 11-14 (1960).[12] The Committee expressly rejected proposals to weaken the anticancer clause in the Color Additive Amendment by allowing the Secretary to establish tolerance levels for carcinogenic substances or to permit a minute amount of a cancer-producing chemical to be added to food if a group of scientists concluded that the quantity to be tolerated was "probably without hazard." *Id.* at 13-14.

In view of the fact that the anticancer clause in the Color Additive Amendment was patterned after that in the Food Additives Amendment, and was enacted on the basis of the Secretary's statement of its intended scope and rationale, based on his familiarity with and contemporaneous interpretation of the parallel clause in the Food Additives Amendment, the foregoing represents a reliable indication of the purpose and effect of the clause in the Food Additives Amendment as well. *See also EDF* v. *HEW*, 428 F.2d 1083, 1091 (D.C. Cir. 1970).

The proposed regulations withholding enforcement for an indefinite and probably extended period of time with respect to the addition of nitrites up to a certain level would, according to FDA, be issued pursuant to 21 U.S.C. § 371(a) (1976), which authorizes the Secretary of HEW to issue regulations for the "efficient enforcement" of the Food and Drug Act. But a grant of authority such as this is only "the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 213, 214 (1976). "For regulations, in order to be valid, must be consistent with the statute under which they are promulgated." *United States* v. *Larionoff*, 431 U.S. 864, 873 (1977). The regulations proposed here would ignore the statutory requirement of a finding to a reasonable certainty that no harm will result from the addition of a food additive and constitute the establishment of a tolerance in direct contravention of the

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[12] The Senate-passed version of the color additive bill did not contain the anticancer clause, *see* S. Rep. No. 785, 86th Cong., 1st Sess. 25-28 (1959), and there were no hearings or debates on the bill on the Senate side, *see* 106 Cong. Rec. 14,349 (1960) (Remarks of Representative Delaney). The pertinent legislative history of the Delaney Clause in the Color Additive Amendment, then, is the rather extensive record on the House side.

edivent congressional judgment that there should be no tolerance for substances found, after appropriate tests, to induce cancer in man or animal. Such regulations would therefore not be consistent with the Food and Drug Act or further its "efficient enforcement."

FDA suggests, however, that while the Delaney Clause states an unequivocal standard with respect to the approval or disapproval of a food additive, it establishes no particular time frame or other requirements or procedures for the implementation or enforcement of a ban of a substance found to cause cancer. FDA points out that there is nothing in the legislative history, judicial interpretation, or commentary on the Delaney Clause addressing the scope of agency enforcement discretion or the manner of implementing a ban on a carcinogenic substance already in use. FDA infers from this silence that Congress did not intend to interfere with normal agency discretion in administering a statute, which FDA believes would permit the proposed phasing out of nitrite use over an indefinite period of time.

We do not believe that the scope of the Commissioner's implementation and enforcement discretion may be so readily divorced from the substantive provisions he is implementing and enforcing. The evident purpose of the Delaney Clause is to prohibit the *use* of additives which induce cancer in test animals, *cf. Bell* v. *Goddard*, 366 F.2d 177, 181, (7th Cir. 1966), not merely to furnish a procedural guidepost for the Commissioner in issuing or revoking regulations.

FDA finds initial support for its argument in these provisions of the Food and Drug Act, 21 U.S.C. §348(1976), establishing procedures for the issuance and revocation of food additive regulations. Under section 348(e), an order promulating or revoking such a regulation is effective upon publication, but the Secretary may stay the effectiveness of the order if a party adversely affected requests a hearing. Section 348(f)(3) then provides that the final order issued after the hearing may not go into effect prior to the 90th day after its publication unless the Secretary finds that emergency conditions exist necessitating an earlier effective date. FDA finds in this last provision a statutory basis for the view that the Commissioner has discretion to determine how to implement his orders, even if that

implementation results in the continued use of an additive found to be unsafe.

We may assume that section 348(f)(3) does grant the Commissioner some discretion to establish a reasonable effective date for a final order revoking an existing food additive regulation, *cf. Niagara Mohawk Power Corp.* v. *FPC*, 379 F.2d 153 (D.C. Cir. 1967), and that a delayed effective date therefore might result in the continued use of an unsafe additive prior to that date. It would be a considerable leap, however, to conclude that this statutory language providing that an order may not go into effect for 90 days authorizes the Commissioner to permit continued use of a substance over a period of years. This is particularly so where, as here, the revocation is based on a finding that the additive is unsafe, rather, for example, than a finding that the additive does not have the functional properties ascribed to it or that the tolerance level established in the regulation is in excess of that required to accomplish the function. The provision in section 348(f)(3) for an effective date before 90 days expire in "emergency conditions" itself indicates that a finding that an additive is unsafe should result in a relatively early effective date.

Moreover, although the procedures for revoking a food additive regulation are, on their face, the same irrespective of the basis for concluding an additive is unsafe, it would seem that Congress' strong disfavor of carcinogenic substances, reflected in the Delaney Clause, necessarily circumscribes the Commissioner's authority to permit the continued use of such a substance and establish a distant effective date of a final order revoking a food additive regulation. *Certified Color Manufacturers Ass'n* v. *Matheus*, 543 F.2d 284, 297-98 (D.C. Cir. 1976); *EDF* v. *EPA*, 510 F.2d 1292, 1302 (D.C. Cir. 1975); *EDF* v. *Ruckelshaus*, 439 F.2d 584, 596 n.41 (D.C. Cir. 1971). *Cf. EDF* v. *HEW*, 428 F.2d at 1901-92. The effective date provisions of 21 U.S.C. § 348 do not furnish significant support for the proposed phase out.[13]

[13] FDA cite a number of situations in which orders revoking the authorization for use of a substance in food have permitted existing stocks of food to which the substance has already been added to be used up. *See, e.g.*, 34 Fed. Reg. 17063 (1969); 19547 (1969); 41 Fed. Reg. 5823 (1976); 41 Fed. Reg. 41882 (1976); 41 Fed. Reg. 41887 (1976). You have not been asked for your opinion on the validity of such a policy with respect to foods to which nitrites have been added if the Commissioner

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FDA does not rest its argument in favor of the phasing out solely, or even primarily, upon the effective date provisions of the Act, however. The phasing out proposal would apparently involve the final revocation of existing food additive regulations and substitution of other regulations setting forth the levels of nitrite which will not trigger enforcement by FDA. This, it is suggested, would constitute a permissible exercise of enforcement discretion. We disagree.

The principle of prosecutorial or enforcement discretion is frequently considered in the context of judicial review of decisions by Executive Branch officials to refuse to institute or continue specific administrative, civil and criminal proceedings. *See, e.g., Dunlop* v. *Bachowski*, 421 U.S. 560, 567 n.7 (1975); *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411 (1958); *The Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457 (1869); *Nader* v. *Saxbe*, 497 F.2d 676, 679 n.18 (D.C. Cir. 1974); *United States* v. *Cox*, 342 F.2d 167 (5th Cir. 1965), *cert. denied*, 381 U.S. 935 (1965). For example, the courts have customarily refused to order the criminal prosecution of particular individuals at the instance of private persons. These cases proceed on the assumption that the prosecutor is intended to have a certain discretion in enforcing the criminal law, legitimately taking into account factors other than the existence of probable cause, *Oyler* v. *Boles*, 368

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should finally determine that nitrites are unsafe food additives. But a policy of exempting existing stocks of food, presumably because of the problems and equitable factors attendant to a recall of foods, would not furnish a precedential basis for a phasing out that would permit the continued addition of nitrites to foods.

FDA also cites two cases involving EPA's decision under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) to provide in an interim suspension order prohibiting the use of the pesticides aldrin and dieldrin that existing stocks of the pesticides could be used up. In *EDF* v. *EPA*, 510 F.2d 1292 (D.C. Cir. 1975), the court noted EPA's justification for these exemptions was that "no appreciable and realistically retrievable stocks existed at the time of the order." EPA later informed the court that approximately 5 percent of the total 1974 amount of aldrin granules would be available for 1975 and that EPA intended to investigate the matter further, a re-evaluation the court found "entirely appropriate." *Id.* at 1306. In *EDF* v. *EPA*, 548 F.2d 998 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 925 (1977), the court had "no doubt" of EPA's authority to exempt existing stocks from a suspension order under FIFRA, even though the statute did not expressly authorize it, but concluded that the Administrator acted arbitrarily in doing so without even inquiring into the amount of stocks left and the feasibility of returning and disposing of them. *Id.* at 998. Both cases therefore suggest that there were limitations to the Administrator's authority to permit all existing stocks to be used up. Moreover, the FIFRA, unlike the Food and Drug Act, does not contain an anticancer clause, and, by contrast, affirmatively requires a weighing of risks and benefits in making a suspension determination. 7 U.S.C. §§ 136(l), 136(bb) 136d(c)(1) (1976). *See EDF* v. *EPA*, 548 F.2d at 1003. These cases lend little support to the phasing out proposal, which would permit continued additions of nitrites to foods over an extended period of time—not under an interim suspension order, but after a final determination that they are unsafe.

U.S. 448, 456 (1962), such as the degree of culpability of the violator, the resulting harm, allocation of prosecutorial resources, the availability of other sanctions, and so on, *see, e.g., Nader* v. *Saxbe*, 497 F.2d at 679, n.18; *Inmates of Attica Correctional Facility* v. *Rockfeller*, 477 F.2d 375, 379-82 (2d Cir. 1973); *Newman* v. *United States*, 382 F.2d 479 (D.C. Cir. 1967) (Burger, J.).

The doctrine that courts should not interfere with particular decisions not to prosecute is also thought to be an incident of separation of powers under the Constitution, which vests in the President, not the Judiciary, the duty to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3. *See, e.g., Nader* v. *Saxbe*, 497 F.2d at 679 n.18; *Newman* v. *United States*, 382 F.2d at 481; *cf. Dunlop* v. *Bachowski*, 421 U.S. at 575–76. These same principles no doubt underlie a judicial reluctance to review individual decisions declining to seek administrative or civil enforcement, *The Confiscation Cases*, 74 U.S. (7 Wall.) 454 (1868); *Vaca* v. *Sipes* 386 U.S. 171, 182 (1967); *Moog Industries, Inc.* v. *FTC*, 355 U.S. 411 (1958), although limited review may be available in some such cases, *see Dunlop* v. *Bachowski*, 421 U.S. 560 (1975).

The question of reviewability of the proposed withholding of enforcement is not involved in this memorandum. Even in the absence of such review, however, the President has a constitutional duty to "take Care that the Laws be faithfully executed." The Secretary of HEW, the Commissioner, and the Attorney General perform their duties in the administration and enforcement of the Food and Drug Act under the general superintendence of the President, and are his agents in fulfillment of his obligation to take care that the Food and Drug Act is faithfully executed, *Myers* v. *United States*, 272 U.S. 52, 135 (1926); *Ponzi* v. *Fessenden*, 258 U.S. 254, 262 (1922); *United States* v. *Cox* 342 F.2d at 171.

We may assume that faithful execution of the laws ordinarily does permit the exercise of judgment in deciding how best to implement the law in the myriad of factual situations with which an agency is confronted. K. David, *Discretionary Justice* 38-39 (1969. This discretion ordinarily may be assumed to extend to the design of the most effective enforcement mechanism and to the decision

whether the purposes of the statute concerned and the ends of justice require the initiation or termination of proceedings in particular case, Abrams, *Internal Policy: Guiding the Exercise of Prosecutoral Discretion*, 19 U.C.L.A. L. Rev. 1, 3 (1971); Kadish, *Legal Norm and Discretion in the Police and Sentencing Processes*, 75 Harv. L. Rev. 904, 906–19 (1962); Note, *The Special Prosecutor in the Federal System: A Proposal*, 11 Amer. Crim. L. Rev. 577, 591–92, 609–10 (1973), although Congress can presumably limit agency discretion when it chooses, *see, e.g., The Confiscation Cases*, 74 U.S. at 457; *United States* v. *Morgan*, 222 U.S. 274, 280–81 (1911);[14] *Bachowski* v. *Brennan*, 502 F.2d 79, 88 & nn. 12, 13 (3d Cir. 1974), *modified on other grounds sub nom. Dunlop* v. *Bachowski*, 421 U.S. 560 (1975); *Adams* v. *Richardson*, 480 F.2d 1159, 1162–63 (D.C. Cir. 1973) (en banc); 2 Op. Att'y Gen. 482, 486 (1831).

There are, for example, particular cases arising under any statutory scheme in which an alleged violation is merely minor and technical or difficult of proof or in which the prudent allocation of resources or equitable factors weigh against the initiation of administrative, civil, or criminal proceedings, even where it appears there may have been a violation of the literal terms of the statute. *See, e.g., ABA Standards Relating to the Administration of Criminal*

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[14] Section 5 of the Food and Drugs Act of 1906 provided that it "shall be the duty of each United States attorney to whom the Secretary . . . reports any violation for institution of criminal, libel of information 'or condemnation or other proceedings . . . to cause appropriate proceedings to be instituted in the proper courts of the United States without delay." This provision was interpreted in *United States* v. *Morgan* as creating a mandatory duty to act on the Secretary's recommendation. *See also United States* v. *75 Barrels of Vinegar*, 192 F. 350, 352 (N.D. Iowa 1911).

As it passed the Senate, section 9 of S. 5, 75th Cong., 1st Sess. (1937), the bill eventually enacted as the Food and Drug Act, would have carried forward this section. C. W. Dunn, *Federal Food, Drug and Cosmetic Act* 781 (1938). The Senate also adopted an amendment to the section that became section 305 of the Food and Drug Act providing that if, after the required notice and hearing prior to referral of a criminal case "it appears that any of the provisions of this act have been violated by such person, then the Secretary shall at once certify the facts to the proper United States attorney." 81 Cong. Rec. 2008 (1937). *Compare* 21 U.S.C. § 336 (1976). These two provisions would have greatly curtailed the Secretary's and the Attorney General's discretion.

The provision imposing a duty on U.S. Attorneys to institute proceedings was deleted by the House committee without explanation. The requirement that the Secretary at once certify facts to the U.S. Attorney if he concluded after a hearing that a violation had occurred was deleted by the House committee as "unnecessary." H.R. Rep. No. 2139, 75th Cong., 3d Sess. 5 (1938). This might have meant that imposition of an express referral duty was "unnecessary" because the Secretary would be expected to refer such cases in any event, or it could have been thought "unnecessary" because it went too far in limiting the Secretary's discretion, particularly in view of the authorization in the succeeding section of the Senate bill to decline to refer minor violations. In any event, the provisions of the Senate-passed bill reflect a concern for enforcement that we cannot, in the absence of any contrary indication in the legislative history, conclude had abated by the time of enactment of the Food and Drug Act.

Justice, The Prosecution Function § 39 (1974) [hereinafter cited as ABA Standards]. *See generally* S. Cox, *Prosecutorial Discretion: An Overview*, 13 Amer. Crim. L. Rev. 383, 411-34 (1977). In the absence of an indication to the contrary, we may assume that Congress does not expect responsible agency officials to act in all such cases, Cox, *supra* at 385-89. This type of enforcement or prosecutorial discretion may ordinarily be considered consistent with the faithful execution of the laws. The legitimacy of the factors entering into the enforcement decision and the realization that courts cannot readily supervise their consideration no doubt explain the reluctance of courts to review individual prosecution decisions. *Bachowski* v. *Brennan*, 502 F.2d at 88, *citing* Davis, *Administrative Law Treatise*, § 28.16 at 984 (1970 Supp.); *Nader* v. *Saxbe*, 497 F.2d at 679 n.18.

Congress expressly sanctioned at least a degree of this type of discretion in enacting the Food and Drug Act. Section 336 of Title 21 provides that the Secretary is not required: "to report for prosecution, or for the institution of libel or injunction proceedings, minor violations of this [Act] whenever he believes that the public interest will be adequately served by a suitable written notice or warning." The purpose of this provision was described by the Senate Committee as follows:

> Violations of the law sometimes occur which are of technical or formal nature only and which do not result in deception or other imposition on public welfare. Usually such violations are inadvertent and their correction can be promptly effected by calling them to the attention of the manufacturer. This section would authorize the enforcing agency to follow this course. It is not intended that this procedure should apply where the violation is more than merely technical and becomes one of substance rather than form. In no event is the conventional legal procedure denied if such action is necessary to effect compliance.
>
> S. Rep. No. 361, 74th Cong., 1st Sess. 28-29 (1935). *See also* S. Rep. No. 493, 83d Cong., 2d Sess. 19 (1934).

Congressman Lea defended this provision on the House floor by noting: "there is nothing more common in the

administration of justice than the exercise of discretion of a prosecuting attorney where he knows it is impracticable to prosecute purely technical violations of the law." 83 Cong. Rec. 7794 (1938). *See also id.*, at 7793; H.R. Rep. No. 2139, 75th Cong., 3d Sess. 5 (1938).

The FDA has informed you that it would not regard the deliberate, continued additions of a carcinogenic substance to food—even at a controlled level—as minor violations within the meaning of 21 U.S.C. § 336 (1976). This conclusion is compatible with the legislative history of the Delaney Clause expressing a clear congressional purpose to prevent the establishment of *any* tolerance level for a substance found to cause cancer when ingested by man or animals. Such violations would appear to be ones of "substance rather than form" for which enforcement "action is necessary to effect compliance." S. Rep. No. 361, 74th Cong., 1st Sess. 28–29 (1935). Therefore, the proposed phasing out of nitrite use does not conform to the scope of enforcement discretion contemplated by the Congress when it enacted the Food and Drug Act. The fact that Congress has expressly sanctioned and established standards for the exercise of enforcement discretion in section 336 should itself caution against a broad assertion of discretion in a situation not covered by that section.

We do not at all question the authority of agencies generally to establish guidelines for enforcement in certain categories of cases. Such a formalized policy may have the purpose or effect of ensuring consistency while allocating scarce agency resources to the most serious types of violations. *See, e.g., Redmond* v. *United States*, 384 U.S. 264 (1966) (policy of declining to prosecute under statute prohibiting mailing of obscene matter where correspondence is between two private individuals); *Petite* v. *United States*, 361 U.S. 529 (1960) (policy of declining prosecution where there has been a State prosecution); *United States* v. *Atlantic Richfield Co.*, 297 F. Supp. 1061, 1072-73 (S.D.N.Y. 1969); *Discretionary Justice* 198–203 (antitrust merger guidelines); Civil Service Commission, Department of Justice, EEOC, Department of Labor Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38,310-38,315 (1958) (statements of enforcement

policy with respect to selection criteria that have disproportionate impact on minority hiring); ABA Standards, *supra*, § 3.9(b)(ii)-(iii). The courts have expressly sanctioned formal and informal enforcement policies of this type designed by the FDA to weed out minor violations fo the Food and Drug Act, relying on the minor violation provision in 21 U.S.C. § 336 (1976), *See, e.g., United States* v. *484 Bags, More or Less*, 423 F.2d 839, 841 (5th Cir. 1970); *United States* v. *449 Cases, Etc.*, 212 F.2d 567, 572-73 (2d Cir. 1954). *See also United States* v. *Goodman*, 486 F.2d 847 (7th Cir. 1973).[15] As in the case of the Uniform Guidelines on Employee Selection Procedures and the Merger Guidelines, a formalized policy may also serve to inform the public of the agency's view of a statute that is vague and capable of broad application, thereby giving an element of certainty to interested parties in the private sector. K. David, *Discretionary Justice, supra* at 198-203; *United States* v. *Ewig Bros. Co. Inc.*, 502 F.2d 715, 724 (7th Cir. 1974), *cert. denied*, 420 U.S. 945 (1975).

The proposed phasing out of nitrites through the withholding of enforcement is of a different order. It would not be a mere formalization of FDA policy on the allocation of scarce enforcement resources, an identification of minor violations, or an effort to give content or limits to a vague statute. The effect of the policy—indeed its purpose—would

[15] FDA has cited *United States* v. *Goodman*, 486 F.2d 847 (7th Cir. 1973), as support for phasing out nitrites. That was an action seeking to enjoin the shipment of chubs containing DDT in excess of 5 ppm., the amount established in interim FDA enforcement guidelines. DDT is a pesticide chemical for which the Administrator of EPA had banned almost all agricultural commodities affected by DDT effective December 31, 1972, after intensive study indicated that DDT may be carcinogenic. 486 F.2d at 854. EPA was authorized to establish tolerances for DDT, taking into account the need to ensure an adequate food supply, on one hand, and the carcinogenic or other harmful properties of DDT, on the other. EPA had not established a tolerance for DDT in fish because the amount derived from other sources was expected to decline as a result of the ban and because studies were still outstanding on its carcinogenic properties. *Id.* at 854-55. In the absence of a tolerance, any amount of DDT on any agricultural commodity would, as a technical matter, adulterate the commodity for purposes of the Food and Drug Act. 21 U.S.C. §§ 342 a)(2)(B), 346a (1976). All fish and apparently all food, apparently contained some traces of DDT, and to enforce the Act literally would have been impossible. The court held that FDA had authority to abide by its interim enforcement guidelines for fish, citing 21 U.S.C. § 336 (1976), the provision permitting the Secretary to excuse minor violations. 486 F.2d at 855.

Goodman does not support the phasing out proposed. Nitrites are deliberately added to some foods, whereas residues of DDT were present in most foods at the time of *Goodman* notwithstanding a near-total ban against new additions of the substance. Moreover, FDA's establishment of a "tolerance" in enforcement guidelines was consistent with the statutory scheme which permitted EPA to establish tolerances. 486 F.2d at 855. *See also United States* v. *Ewig Bros. Co. Inc.* 502 F.2d 715, 720-21 (7th Cir. 1974), *cert. denied*. 420 U.S. 945 (1975). No administrative agency has authority to establish tolerances for nitrites if FDA concludes they have been found to cause cancer when ingested by man or animal, and the Food Additives Amendment, 21 U.S.C. § 348 (1976), unlike the Pesticide Chemical Amendment, 21 U.S.C. § 346a (1976), contains no authorization to consider beneficial effects of a substance in producing an adequate food supply.

be to authorize the continued use of nitrites in certain products under circumstances that would concededly constitute non-minor violations of the specific terms of the Food and Drug Act.

The courts that have recognized that Executive Branch officials must have some discretion in the enforcement of laws have recognized that there are legal limitations on the exercise of discretion that the officials are bound to follow. *See, e.g., Dunlop* v. *Bachowski*, 421 U.S. at 574; *Joint Tribal Council of the Passamaquoddy Tribe* v. *Morton*, 528 F.2d 370, 379–80 (1st Cir. 1975); *Nader* v. *Saxbe*, 497 F.2d at 679–80 n.19; *Adams* v. *Richardson* 480 F.2d at 1161–62. Congress has imposed just such limitations on FDA, prohibiting the approval of a substance absent a finding of "no harm," the consideration of beneficial effects, and the establishment of a tolerance for a carcinogenic substance. Phasing out nitrites thorugh the withholding of enforcement based on these considerations would therefore not constitute the exercise of discretion, but a contravention of limitations Congress deliberately placed on administrative discretion. To decline to seek enforcement in the manner proposed would constitute an abdication of enforcement responsibilities. *Dunlop* v. *Bachowski*, 421 U.S. at 574, *Office Employes Local 11* v. *NLRB*, 353 U.S. 313 (1957); *Adams* v. *Richardson*, 480 F.2d 1159 (D.C. Cir. 1973); *Nader* v. *Saxbe*, 497 F.2d at 679–80.

The public health considerations underlying the desire to permit the continued addition of nitrites and nitrates to certain foods are clearly important. But the balancing of these competing health risks is a matter for the Congress in determining whether to amend the Food and Drug Act, not for the Secretary in administering the law.

Secretary Flemming addressed this issue during his testimony before the House Committee in 1960 regarding the anticancer clause of the proposed Color Additive Amendment. At the Secretary's request, a report by the National Cancer Institute was inserted in the record. The report in turn cited the conclusion of a report entitled "Problems in the Evaluation of Carcinogenic Hazard From Use of Food Additives" prepared by a subcommittee of the Food Protection Committee of the National Academy of Sciences—National Research Council:

> Because of the vagueness of present knowledge concerning quantitative aspects of the carcinogenic process, use of any amount of a carcinogen as a food additive probably is justified only if (1) values to the public are such that banning the use would constitute an important loss or hardship, and (2) there is no reasonably good noncarcinogenic alternative.

Secretary Flemming then stated:

> In connection with the statement just quoted from the Food Protection Committee report, I want to call attention to the fact that the two criteria recommended by the Committee are connected, not by an "or" but by an "and." I am advised by Commissioner of Foods and Drugs George P. Larrick that he and his associates know of no situation in this country which meets both of these criteria. If and when such a situation does develop, we will present the facts to the Congress with a request for appropriate action. We believe such situations—if they occur at all—will be so few and far between that a decision to subject the public to the risk involved should be a joint decision on the part of both the legislative and executive branches.
>
> *Color: Additives Hearing*, at 60-61.

Accordingly, if the Secretaries take the view that circumstances warrant, for an indefinite period of time, the addition of nitrites and nitrates to the foods in question because of a public interest in the continued availability of the foods and because of the absence of alternative, noncarcinogenic preservatives, the course to be taken, as contemplated when the statute was enacted in 1960, would be to seek special legislation.

Congress last year took just this approach with respect to saccharin, although not at the instance of FDA. The Saccharin Study and Labeling Act, P.L. 95-203, 91 Stat. 1451 (1977), postponed the effective date of a proposed Saccharin test under the Delaney Clause on the ground that there was an important public interest in its continued availability, at least for a period of further study, despite tests indicating it caused cancer in animals. *See* H.R. Rep. No. 658, 95th Cong., 1st Sess. 8 (1977); S. Rep. No. 353, 95th Cong., 1st Sess. 5, 7 (1977). The inflexibility of the Delaney Clause was a principal issue in the Saccharin debate, H.R. Rep. No. 658, *supra* at 4-5, 7, 36-37; S. Rep. No. 353, *supra* at

7; *Hearing on the Banning of Saccharin before a Subcommittee of the Senate Committee on Human Resources*, 95th Cong., 1st Sess. 7, 37, 54, 95, 99–100, 129 (1977) [hereafter, cited as 1977 Senate Hearing]; *Hearing on Moratorium on Saccharin Ban before a Subcommittee of the House Interstate and Foreign Commerce Committee*, 95th Cong., 1st Sess. 64, 77, 82 (1977) [hereafter, cited as 1977 House Hearing], particularly because, in that case, as with nitrites, there was not alternative noncarcinogenic substance available. *1977 Senate Hearing, supra* at 37, 127–29; *1977 House Hearing, supra* at 83–84. Accordingly, in section 2(a)(1) of the Saccharin Study and Labeling Act, Congress directed the Secretary of HEW to conduct a study of the current regulatory policy regarding substances found to induce cancer in animals, including a consideration of how the benefits of such substances could be weighed against their harmful effects. There was agreement that the Delaney Clause, as currently in effect, did not permit a weighing of benefits and risks, S. Rep. No. 353, *supra* at 4, 7; H.R. Rep. No. 658, *supra* at 5, 37, and Commissioner Kennedy expressly eschewed the existence of any such authority, either under the Delaney Clause or the Food Additives Amendment generally, *1977 House Hearing, supra* at 64, 69; *1977 Senate Hearing* at 132.

There is, moreover, no suggestion in the legislative history of the Saccharin Study and Labeling Act that the Secretary would or could avoid the automatic impact of the Delaney Clause by withholding enforcement. Indeed, although the question of enforcement was never directly raised,[16] the Delaney Clause was on a number of occasions said to require that food containing a carcinogen be removed from the market, H.R. Rep. No. 658, *supra* at 7, or to prohibit FDA from authorizing "further use of an additive based on a judgment that the benefits of continued use outweigh the risks involved," *id.* at 5. *See also id.* at 17, 19, 36; S. Rep. No. 353, *supra* at 3, 5, 7.

Conclusion

The Secretaries of HEW and Agriculture have the

[16] There would have been no occasion to consider the issue, because the FDA's notice of proposal to revoke the interim food additive regulation for saccharin indicated an intention to enforce the ban immediately following the effective date of the order. H.R. Rep. No. 658, 95th Cong., 1st Sess. 17, 44–45 (1977).

discretion, upon making a finding that nitrites are carcinogenic, to adopt timetables and procedures to assure the orderly removal of that substance from commerce. It is our opinion that the Secretaries, however, do not have the authority to balance the benefits of nitrites against their potential harm and determine that their continued use will be permitted until such time as a feasible substitute is developed and put in place. Upon a determination by the Secretaries that an additive causes cancer in man or animals, the decision whether the statutory ban shall be postponed or eliminated is reserved to the Congress.

JOHN M. HARMON
Assistant Attorney General,
Office of Legal Counsel.

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DEPOSITORY 376

OPINION OF THE ATTORNEY GENERAL OF THE UNITED STATES

CREDIT CONTROL ACT—AUTHORITY TO REGULATE AND CONTROL CERTAIN EXTENSIONS OF CREDIT

A proposed Executive Order announcing the President's determination that the regulation and control of credit is "necessary and appropriate for the purpose of preventing or controlling inflation generated by the extension of credit in an excessive volume," authorizing the Board of Governors of the Federal Reserve System to regulate and control three types of extensions of credit and to prescribe and appropriate requirements as to the keeping of records with respect to all forms of credit, and ordering that such authorizations remain effective for an indefinite period and until revoked by the President, would constitute a proper exercise of the President's authority under the Credit Control Act, 12 U.S.C. § 1901 *et seq.*

The Credit Control Act, 12 U.S.C. 1901 *et seq.*, does not transgress the constitutional prohibition against excessive delegations of legislative power.

Three kinds of credit controls that the Board of Governors of the Federal Reserve System would consider issuing, if so authorized by the President, would be within the Board's authority under the Credit Control Act, 12 U.S.C. §§ 1905(10) and (11).

MARCH 13, 1980.

THE SECRETARY OF THE TREASURY

MY DEAR MR. SECRETARY: I am responding to your March 13, 1980 request for my opinion concerning a recommendation by the President's economic advisers that the President, by Executive Order, authorize the Board of Governors of the Federal Reserve System to regulate and control certain extensions of credit under the Credit Control Act, 12 U.S.C. § 1901 *et seq.* You have forwarded to me, for my information, copies of an Executive Order proposed by the President's advisers and of regulations proposed by the Board to effect certain credit controls that the Chairman of the Board of Governors has informed you the Board will consider issuing if the Order is executed. You have asked me whether the recommended Order

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would constitute a proper exercise of the President's authority under the Act, and, if the President issues the Order, whether the proposed credit control measures transmitted to you by the Chairman would be within the Board's authority under the Act.

Under 12 U.S.C. § 1904, the President may authorize the Board "to regulate and control any or all extensions of credit" whenever he: determines that such action is necessary or appropriate for the purpose of preventing or controlling inflation generated by the extension of credit in an excessive volume, ...

The proposed Executive Order would announce such a determination by the President, would authorize the Board both to regulate or control three types of extensions of credit and to prescribe appropriate requirements as to the keeping of records with respect to all forms of credit, and would order that such authorizations remain effective for an indefinite period and until revoked by the President. Each of these measures, as explained below, constitutes a proper exercise of the President's authority under the Act.

Although the Act includes no particular requirements for the form of the President's determination under § 1904, the incorporation of his determination in an Executive Order that specifies the Board's consequent authorities is entirely appropriate. Further, the President is empowered by the Act, §§ 1904, 1905, to determine what types of extensions of credit are appropriately subject to the Board's regulation and to authorize the Board to implement any or all of the regulatory measures specified in § 1905. This is evident from both the language of §§ 1904 and 1905, and from the legislative history of the Act,[1] which amply reflect Congress' intent to give the President the most flexible authority possible in mounting, through the control of credit, an appropriate attack on inflation.[2]

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[1] *See* H. Rep. No. 755, 91st Cong., 1st Sess. 11 (1969); H. Rep. No. 769, 91st Cong., 1st Sess. 11 (1969); 115 Cong. Rec. 39649–697, 40239–244, *passim* (1969), especially at 39680 [remarks of Rep. Sisk]; 39669, 40241 [remarks of Rep. Patman]; 39676 [remarks of Rep. Barrett]; 39683 [remarks of Rep. Ottinger]; 39684 [remarks of Rep. Matsunaga]; 39673, 39674, 40240, 40242 [remarks of Rep. Sullivan].

[2] Despite the flexibility of the authority vested both in the President and the Board of Governors of the Federal Reserve System, the Act does not transgress the constitutional prohibition against excessive delegations of legislative power. The determination required of the President, that action "is necessary or appropriate for the purpose of preventing or controlling inflation generated by the extension of credit in excessive volume," 12 U.S.C.

Finally, § 1905 provides that the Board's authority to implement credit controls shall exist "for such period of time as [the President] may determine." This authorizes the President to specify the duration, whether definite or indefinite, of any control authority, which he would be doing if he issues the Order as drafted, *see* § 1-106.

The Chairman of the Board has informed you that, if the President executes the Order, the Board will consider issuing three regulations to effect certain credit controls. These credit controls would be within the authority granted by the Order. They would specifically address the following kinds of extensions of credit—consumer credit, activities of "money market funds" and similar entities, and the managed liabilities of commercial banks that are not members of the Federal Reserve System—the regulation of which is authorized by the Order. Further, because the Order does not limit the kinds of controls that may be imposed on these extensions of credit, the controls would be within the Board's authority if they are anywhere authorized among the controls listed in 12 U.S.C. § 1905. I conclude, as explained below, that each of the proposed controls is among the measures authorized by that section.

The consumer credit regulation would require that certain creditors extending certain kinds of consumer credit maintain a special non-interest bearing deposit with the Federal Reserve equal to a specified percentage of the amount by which certain types of the creditor's outstanding consumer credit would exceed a designated base. This control is designed to discourage the expansion of consumer credit. It is expressly authorized by § 1905(10), which permits the Board to prescribe "maximum ratios, applicable to any class of . . . creditors . . . of loans, of one or more types or of all types . . . (B) to assets of one or more types or of all types." In this case, the Board would be establishing maximum ratios between consumer credit loans extended in excess of the designated base and both the amount of assets available to covered creditors to sup-

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§ 1904, provides an adequate standard against which the terms of the President's authorization and the Board's subsequent actions may be assessed. See *AFL-CIO v. Kahn*, No. 79-1364, Slip Opinion at 20-21 n. 51 (D.C. Cir. June 13, 1979) [en banc], *cert. denied*, 99 S. Ct. 2107 (1979); *Amalgamated Meat Cutters and Butcher Workmen v. Connally*, 337 F. Supp. 737, 744-760 (D.D.C. 1971) [three-judge court].

port such loans, and the amount of assets to be deposited with the Federal Reserve. Such a requirement would also limit the circumstances in which credit in excess of the designated base could be extended, and would be within the Board's authority under § 1905(11) to "prohibit or limit any extensions of credit under any circumstances the Board deems appropriate."

The money market fund regulation would require such funds and similar entities to maintain a special non-interest bearing deposit with the Federal Reserve equal to a specified percentage of the amount by which the extensions of credit by them exceed their outstanding extensions of credit on a specified date. The covered entities typically act as financial intermediaries, accepting funds from investors for the purchase of "money market instruments," *i.e.*, various instruments of indebtedness with short-term maturities that are issued by governmental units, corporations, or individuals. The intent of the regulation is to curb inflation by curbing the volume of credit available through money market funds and similar entities. Like the control to be imposed on certain extensions of consumer credit, the requirement that money market funds maintain special non-interest bearing deposits would be authorized by § 1905(10), because it would establish a maximum ratio between these funds' net extensions of credit and both their net increases in assets available for such extensions of credit and their assets to be deposited with the Federal Reserve. Such a requirement would also limit the circumstances in which money market funds may make further extensions of credit and is authorized by § 1905(11).

The managed liabilities regulation contemplates a requirement that commercial banks that are not members of the Federal Reserve System maintain a non-interest bearing special deposit with the Federal Reserve equal to a specified percentage of the amount by which the total of certain managed liabilities of the covered banks exceeds a base amount of such liabilities outstanding. The covered liabilities would include extensions of credit to the covered banks that such banks typically use to support the credit they themselves extend. The intent of the contemplated requirement is to discourage the expansion of credit by the covered institutions. It is authorized by § 1905(10), which

permits the board to "prescribe maximum ratios, applicable to any class of . . . borrowers . . . of loans, of one or more types or of all types . . . (B) to assets of one or more types or of all types." In this case, the Board would prescribe a maximum ratio between certain credit that can be extended to a bank and both its increase in assets available to support extensions of bank credit and its assets to be deposited with the Federal Reserve. The proposed control would also limit the circumstances under which credit would be extended to covered banks, and is thus within the authority of § 1905(11).

You will note that, in determining whether the proposed control measures would be within the Board's authority under the Act, I have relied exclusively on the language of the Act and on the anti-inflationary intent of the measures. Because the legislative history of the Act does not elaborate on the scope of the control provisions of § 1905 and does not suggest that Congress' intent is in any way inconsistent with the Act's plain meaning, we conclude control measures that are covered by the plain meaning of the statute and that relate to its purpose are authorized. Each of the proposed measures meets these standards.

In sum, the Executive Order, if executed, will be a proper exercise of the President's statutory authority and, if the President issues the Order, the proposed credit control measures will be within the Board's authority under the Act.

Sincerely,

BENJAMIN R. CIVILETTI.

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OPINION OF THE ATTORNEY GENERAL OF THE UNITED STATES

FEDERAL FOOD, DRUG AND COSMETIC ACT — PROHIBITION ON DISCLOSURE OF TRADE SECRET INFORMATION TO A CONGRESSIONAL COMMITTEE

Section 301(j) of the Federal Food and Drug Act (52 Stat. 104, 21 U.S.C. 33(j) prohibits the Department of Health, Education, and Welfare from furnishing certain trade secret information to a Congressional committee.

This opinion involves only the statutory construction of a particular Act of Congress. It does not involve the assertion of a constitutionally based executive privilege or an analysis of the constitutional prerogatives of the legislative branch.

SEPTEMBER 8, 1978.

THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE.

MY DEAR MR. SECRETARY: This is in response to your request of August 17 that we consider further the question of whether you are prohibited by § 301(j) of the Federal Food, Drug, and Cosmetic Act, Act of June 25, 1938, 52 Stat. 1042, 21 U.S.C. § 331(j), from disclosing certain trade secret information to the Committee on Interstate and Foreign Commerce of the House of Representatives. You have specifically requested in this regard that we review a memorandum prepared by the Congressional Research Service (CRS) which concludes that § 301(j) does not bar the disclosure of trade secret information to the Committee. After considering the relevant materials, including the CRS memorandum, I must affirm the conclusion reached in the August 9 letter from Acting Attorney General Egan to Under Secretary Champion that you are required by § 301(j) to decline to furnish trade secret data covered by that section to the Congress or one of its Committees. I base this conclusion on the unqualified language of § 301(j), the consistent and longstanding interpretation to this effect by your Department, and prior congressional approval of that interpretation through the rejection of an amendment to create an express

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exemption permitting disclosures to Congress.

Before turning to the merits, it is important to emphasize the limited nature of the issue at hand. The present inquiry does not involve any assertion of a constitutionally based privilege; it involves only the application of an act of Congress.

Further, the discussion and conclusions below relate only to § 301(j) of the Federal Food, Drug, and Cosmetic Act, based on the mandatory language and settled administrative and congressional interpretation of that section.[1]

DISCUSSION

Section 301(j) provides:

> Sec. 301. The following acts and the causing thereof are hereby prohibited:
>
> * * *
>
> (j) the using by any person to his own advantage, or revealing, other than to the Secretary or officers or employees of the Department, or to the courts when relevant in any judicial proceeding under this Act, any information acquired under authority of section 404, 409, 505, 506, 507, 510, 512, 513, 514, 515, 516, 518, 519, 520, 704, 706, or 708 concerning any method or process which as a trade secret is entitled to protection.

On its face, this section imposes an absolute bar to disclosure of trade secret information outside your Department, with one exception: [2] such information may be made available to a court in a judicial proceeding under the Act. In view of this express prohibition against revealing information to any person outside HEW or the courts, *cf. Pharmaceutical Manufacturers Ass'n.* v. *Weinberger*, 401 F. Supp. 444, 445 (D.D.C.) (Sirica, J.), any exception for disclosure to the Congress would necessarily have to be implied. Moreover, under accepted principles of statutory

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[1] My predecessors and one court decision have interpreted less absolute language in other confidentiality statutes to create no bar to release to the Congress. *See, e.g., Ashland Oil, Inc.* v. *FTC*, 548 F.2d 977, 979 (D.C. Cir. 1976); 43 Op. A.G., No. 5 (November 12, 1975) (both involving the furnishing of information to the Interstate and Foreign Commerce Committee).

[2] An additional exception is contained in § 708 of the Act. In 1976, Congress added this section to provide that the Secretary may reveal confidential information to persons contracting with the Department if necessary to further the purposes of the Act and if appropriate security is ensured. Act of May 28, 1976, § 8, 90 Stat. 582, 21 U.S.C. 379. This section apparently permits release of trade secret information covered by § 301(j). See S. Rep. No. 94-33, 94th Cong., 1st Sess. 33 (1975). Contractors performing work for the Department may often have the same need for access to trade secret information as the Department's employees who perform functions under the Act. Because contractors and their personnel acquire information under § 708 of the Act, they are subject to criminal penalties under § 301(j) if they reveal information to the outside.

construction (*expressio unius est exclusio alterius*), the existence of the one express exception would appear to negate the implied existence of any others. This rule has particular force here, where Congress has provided for disclosure of information by one coordinate branch of the government to another, but made no mention of disclosure to the third — here, the Congress. These factors, and the inclusion of criminal penalties for disclosure of this often highly valuable information, suggest that an exception to the seemingly absolute terms of § 301(j) should not lightly be implied.

We have not located anything in the legislative history of the Food, Drug, and Cosmetic Act of 1938 that directly addresses the issue of releases of information to the Congress, and that history therefore would appear to furnish no basis for implying an exception to the otherwise flat prohibition in § 301 for such releases. The legislative history does stress, however, that the section is intended to "safeguard the property rights of the manufacturer." S. Rep. No. 361, 74th Cong., 1st Sess. 27 (1935) *see also* S. Rep. No. 493, 73d Cong., 2d Sess. 18, 21 (1934). This underlying purpose is best served by closely guarding trade secret information and, conversely, is undercut to the degree exceptions are fashioned to the confidentiality requirement.

Our reading of the language of § 301 is supported by your Department's longstanding and consistent interpretation of the section. This administrative interpretation goes back to at least 1955, for in that year HEW stated in its reply to a questionnaire submited to executive departments and agencies by the Special Subcommittee on Government Information of the House Committee on Government Operations that FDA did not make information protected by § 301(j) available to individual Members of Congress or to congressional committees upon request or subpoena. *See Replies from Federal Agencies to Questionnaire Submitted by the Special Subcommittee on Government Information of the House Committee on Government Operations*, 84th Cong., 1st Sess. 247-48, 251 (Comm. Print, 1955); *see also* H.R. Rep. No. 2947, 84th Cong., 2d Sess. 155 (1956).

The issue of congressional access to method and process information was presented more sharply in 1962 in connection with a request by Representative Fountain, Chairman of the Subcommittee on Intergovernmental Relations of the House Government Operations Committee, that FDA permit that subcommittee's staff to examine the new drug application files

for two drugs that had just been withdrawn from the market due to discovery of their dangerous side effects. The subcommittee sought the information to determine whether FDA had met its responsibilities in clearing these two drugs, MER/29 and Flexin, for the market. FDA Commissioner Larrick denied the request, stating:

> [T]he Federal Food, Drug, and Cosmetic Act imposes certain restrictions on us which we must respect. Under the law we are forbidden to disclose any information submitted in connection with a new drug application that is entitled to protection as a trade secret.[3]

An Assistant General Counsel of your Department took the same position in a letter to Senator Harrison Williams during consideration of the Drug Listing Act of 1972:

> We have not granted Congressional committees access to the type of trade secret "method or process" which, under 21 U.S.C. 331(j), we are explicitly prohibited from disclosure [sic] outside the Department of Health, Education, and Welfare. Such information includes manufacturing processes, product composition (to the extent not shown in labeling) and specifications, and other highly valuable secret information.[4]

This longstanding interpretation of § 301(j) is now embodied in regulations promulgated on December 24, 1974 covering availability of FDA information generally. 39 Fed. Reg. 44602, 44649, *codified at* 21 CFR 20.87(a).

The Supreme Court has held that deference must be paid to an agency's construction of a statute it is charged with administering. *See, e.g., Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). This principle of statutory construction has been applied with regard to FDA's interpretation of § 301(j), albeit not in a context involving congressional access to the information. In refusing to enjoin enforcement of the FDA regulations just mentioned on the ground that they did not adequately protect the confidentiality interests of the drug companies, the court stated that in promulgating the regulations, FDA not only construed the Freedom of Information Act, "but also interpreted and construed 21

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[3] Letter dated May 10, 1962, from George P. Larrick, Commissioner of Food and Drugs, to Rep. L. H. Fountain, *reprinted in* 108 Cong. Rec. 21071 (1962).

[4] Letter dated December 22, 1971, from Peter Barton Hutt, Assistant General Counsel, Food, Drugs, and Environmental Health Division, to Senator Harrison A. Williams, *reprinted in Hearing on S. 2167 and H.R. 9936 before the Senate Committee on Labor and Public Welfare*, 92nd Cong., 1st Sess. 43, 48 (1971).

U.S.C. § 331(j) which directly concerns the realm of its special expertise and administrative experience. In reviewing the merits of the case this is an important consideration." *Pharmaceutical Manufacturers Ass'n* v. *Weinberger, supra*, 401 F. Supp. at 446. This principle of deference to administrative interpretation was also invoked in a case involving the Federal Trade Commission's interpretation of another confidentiality statute, 15 U.S.C. § 46(f), in the context of a request from a congressional committee — in that case, as here, the Subcommittee on Oversight and Investigations of the House Interstate and Foreign Commerce Committee. *See Ashland Oil, Inc.* v. *FTC, supra*, 548 F.2d at 981-82 n.6. Applying the principle in the present case, your Department's longstanding interpretation of § 301(j) is entitled to considerable weight.

Your Department's interpretation of § 301(j) has also been approved by the Congress on two occasions of which we are aware. The first occasion was in 1962, during consideration of the Drug Industry Act of 1962. The Administration's proposed bill would have amended § 301(j) by deleting the qualification that information was barred from release only if it concerned "any method or process which as a trade secret is entitled to protection." This would have greatly expanded § 301(j) to cover information that did not relate to trade secrets. *Hearings on H.R. 11581 and 11582 before the House Committee on Interstate and Foreign Commerce*, 87th Cong., 2d Sess. 11, 30, 68 (1962) [hereinafter *1962 Hearings*]. This disturbed Representative Fountain, coming as it did on the heels of FDA's refusal (discussed above) to turn over to his subcommittee any information in the new drug applications relating to MER/29 and Flexin. *Id.* at 109. Accordingly, he recommended that a proviso be added to § 301(j) stating that nothing in the Act would authorize the withholding of information from duly authorized committees of the Congress. *Id.* at 111.[5]

In testifying against the proposed amendment of § 301(j), Representative Fountain observed that in connection with the request for information relating to MER/29 and Flexin, his subcommittee staff had assured FDA officials that "neither they

[5] The Administration's bill would also have amended § 301(j) to permit release of trade secret information not only to HEW employees and the courts, but also "as authorized by law." *Hearings, supra*, at 11. Similar language in 18 U.S.C. § 1905 has been construed to permit the release to a duly authorized committee of Congress of confidential information relevant to the committee's investigation. 41 Op. A.G. 221 (1955). Ironically, then, the amendment Representative Fountain opposed may actually have permitted releases to the Congress.

nor the subcommittee were interested in seeing any information entitled to protection by law as a trade secret." *Id.* at 110. He objected instead to FDA's withholding of new drug application files in their entirety, including those portions which in his view did *not* contain trade secret information. Thus, Representative Fountain saw the proposed amendment to § 301(j) as an attempt to translate into law what he believed to be Commissioner Larrick's unjustifiably broad view of the type of information protected by § 301(j), *id*, or to furnish a statutory basis for an FDA regulation, also discussed in Mr. Larrick's letter, that expressly barred the release of any portion of a new drug application file. 108 Cong. Rec. 21070 (1962). The effect, as Representative Fountain saw it, would be to "make it virtually impossible for the congressional committees which have responsibilities in connection with food, drug, and cosmetic legislation or the operations of the Food and Drug Administration to obtain the information necessary for the effective discharge of those responsibilities." *1962 Hearings* at 109.

It is clear that Representative Fountain agreed with FDA's interpretation that § 301(j) as it then read barred access by Congress to whatever information was covered by the section.[6] It is also clear that he did not believe that it was necessary for Congress to have access to what he regarded as true trade secrets covered by the section. He was concerned only about FDA's withholding of information that he did not believe was in fact protected by § 301(j).[7]

The Interstate and Foreign Commerce Committee incorporated Mr. Fountain's proposed amendment in the bill as reported. The committee report stated that the amendment would "remove any basis for a claim by the Department of Health, Education, and Welfare that the Department is prohibited by the basis [sic] act from providing congressional committees information which they request." H. Rep. No. 2464,

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[6] Representative Fountain stated during the same hearings: "To me it is unthinkable that information, *other than trade secrets*, which is available to officers and employees of the Department of Health, Education, and Welfare, as big as it is, as well as to the courts, should not also be available to the Congress, which passes the legislation and appropriates the funds necessary for the Department's operations." *1962 Hearings* at 111 (emphasis added), *reprinted in* 108 Cong. Rec. 21071-72 (1962).

[7] After Representative Fountain concluded his remarks before the Committee, Representative Moss noted that he intended to support the amendment, but wanted the record to reflect his belief that Congress had a right to access to the information under § 301(j) as it then read. He stated that his Information Subcommittee of the Government Operations Committee had considered the issue in 1956, and he observed that there was, in his view, nothing in § 301(j) or its legislative history indicating that Congress intended the section to bar congressional access. *1962 Hearings* at 111-112.

87th Cong., 2d Sess. 15 (1962). The Senate bill did not contain a similar amendment permitting congressional access.

The conference committee omitted the House amendments to § 301(j). This, the conference report stated, "leaves existing law on this subject unchanged." H.R. Rep. No. 2526, 87th Cong., 2d Sess. 26 (1962). Under then-"existing law," as explained to the House Interstate and Foreign Commerce Committee and to the full House by the sponsor of the amendment, Mr. Fountain, trade secret information covered by § 301(j) could not be released to the Congress. This understanding that then-existing law barred disclosure of trade secret information to Congress is also reflected in the explanation given to the Senate of the work of the conference committee by Senator Kefauver, the floor manager:

> The House bill extended the scope of the confidentiality requirement in section § 301(j) of the Food, Drug, and Cosmetic Act, but made a special provision to the effect that "nothing in this act shall authorize the withholding of information from the duly authorized committees of the Congress." The conferees decided to strike the confidentiality provision entirely from the bill and to leave the law on this matter as it is.
>
> The Senate Subcommittee on Antitrust and Monopoly has in the past had no difficulty in securing information from the Food and Drug Administration and has *never wished to secure information of the type prohibited by the present law; namely, information relating to "any method or process which as a trade secret is entitled to protection."* It is expected, of course, that since the Congress is not making the law more restrictive on this matter, the FDA will not make its interpretation and administration of section § 301(j) more restrictive. *Congress and the public deserve to have access to information in the Food and Drug Administration which is not of the nature of a trade secret and is in the public interest.* 108 Cong. Rec. 22040 (emphasis added).

Thus, the Congress in 1962 appears to have recognized and, by rejecting the proposed amendment, to have ratified your Department's position that § 301(j) bars release to congressional committees.[8]

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[8] The controversy surrounding FDA's refusal to release information about MER/29 and Flexin and the proposed amendment of § 301(j) were discussed in a House Government Operations Committee report on the availability of information from federal departments and agencies. The report was released shortly after passage of the Drug Industry Act of 1962. *See* H.R. Rep. No. 918, 88th Cong., 1st Sess. 9, 13-16 (1962). This report describes the studies and findings of the Special Subcommittee on Government Information, chaired by Representative Moss.

The relevant section of the report begins by stating that FDA's withholding of information from

In enacting the Drug Listing Act of 1972 Congress again considered the issue of congressional access to trade secret information. Again, the occasion was a bill, H.R. 9936, 92d Cong., that Members of Congress believed would have expanded the coverage of § 301(j) in several ways — most significantly by including any information entitled to trade secret protection, not just that relating to "method or process."

After H.R. 9936 passed the House, Representative Fountain wrote Chairman Rogers of the Public Health and Environment Subcommittee of the House Committee on Interstate and Foreign Commerce noting that his subcommittee staff had just had an opportunity to review the bill's details. He pointed out that the Congress had rejected a similar expansion of § 301(j) in 1962 and, as a result, "FDA has had no grounds for denying requests for information, *other than information on methods or processes which are entitled by law to protection as trade secrets*, from duly authorized committees of the Congress." Letter dated September 28, 1971, from Rep. Fountain to Rep. Rogers (emphasis added). This letter was made available to the Senate committee considering the bill, as was a memorandum from the Counsel to the House Interstate and Foreign Commerce Committee suggesting that the defect could be cured by including a proviso that the bill's broadening of § 301(j) did not authorize the withholding of information from duly authorized committees of Congress. *Hearing on S. 2167 and H.R. 9936 before the Senate Committee on Labor and Public Welfare*, 92d Cong., 1st

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Representative Fountain's subcommittee "resulted in a clear expression by the House of Representatives, with support from the Senate, of the requirement that Congress shall not be denied the information it needs for the discharge of its legislative responsibilities." *Id.* at 13-14. The report then notes that all information sought by the subcommittee was eventually furnished, but that a "legislative expression" was advisable to avoid future withholdings. Indeed, the report states that after the House adopted Mr. Fountain's amendment providing an exemption for furnishing information to Congress, FDA "hastened to reassure both House and Senate conferees that there would be no further attempts to withhold information from Congress, and the bill was reported without the amendment." *Id.* at 16.

We understand that FDA has been unable to find any documentation of precisely what representations were made to the conferees. However, in context, it seems likely that FDA would only have informed the conferees that it would not attempt to withhold the specific information Representative Fountain's subcommittee had requested regarding MER/29 and Flexin. Mr. Fountain stated that he was not seeking legitimate method and process trade secret information about these drugs from FDA. *See 1962 Hearings* at 108-111. Thus, the release of the information to the subcommittee would not have constituted a departure from FDA's consistent position that Congress cannot receive § 301(j) information. For the same reason, if the conferees decided to omit the House amendment to § 301(j) as a result of FDA's assurances that the information regarding MER/29 and Flexin would be turned over, this would be entirely consistent with the conferees' understanding that § 301(j) barred release of true trade secret information to Congress. It seems unlikely that FDA would have informed the committee that trade secret information would never be withheld from the Congress, in view of FDA's position both before and since that § 301(j) would prohibit this and Representative Fountain's and Senator Kefauver's explanations to the same effect.

Sess. 35, 36, 38 (1971). The Commissioner of Food and Drugs, Charles E. Edwards, likewise observed that the proposed amendment of § 301(j) might restrict access by Congress to information received under the Act, and he too opposed further limits in the disclosure of information. *Id.* at 39. *See also id.* at 48-50. Based on these expressions of concern, the Senate committee dropped the broadening amendment. S. Rep. No. 92-924, 92d Cong., 2d Sess. 4-5 (1972); 118 Cong. Rec. 26157 (1972). But there is no indication that the committee, the Senate, or the House disagreed with Representative Fountain's underlying premise that § 301(j) information may not be disclosed to the Congress.

The Supreme Court has recognized that the construction of a statute by those charged with its execution is particularly deserving of respect when Congress has directed its attention to the administrative construction and left it unaltered. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969); *United States* v. *Bergh*, 352 U.S. 40, 46-47 (1956). Accordingly, FDA's longstanding interpretation of § 301(j) is entitled to particular deference here.

CONGRESSIONAL RESEARCH SERVICE MEMORANDUM

The CRS memorandum you forwarded to us does not address the FDA's longstanding administrative interpretation of § 301(j) or the congressional acceptance of that interpretation, both of which we have found especially persuasive. The CRS memorandum primarily concerns itself instead with general principles regarding Congress' investigative powers, other confidentiality statutes not involved in the instant case, and, in our view, a misreading of the language of § 301(j) and its legislative history. The various points discussed will be considered individually.

1. Initially, the memorandum suggests (at pp. 2-5) that the present situation "raises anew the question as to the scope of Congress' power to carry out its constitutional functions," and it discusses cases in which the Supreme Court has affirmed Congress' broad investigatory prerogatives. We do not question the breadth of Congress' inherent investigative powers. The only issue involved here is whether the Congress has imposed upon itself statutory restrictions on its ability to obtain certain trade

secret information. A decision to do so, in view of the highly sensitive nature of the data, is not inconsistent with a recognition of broad investigative powers in the absence of such a statute.

2. The memorandum argues (at pp. 5-8) that neither the express language of § 301(j) nor any necessary implication from its language restricts access to information by duly authorized committees of Congress. We do not see how the express language of the section could be any clearer: it is unlawful to reveal method or process information, "other than to the Secretary or officers or employees of the Department, or to the courts." A disclosure to a congressional committee is certainly "other than" within the Department or to the courts. *Cf. Pharmaceutical Manufacturers Ass'n* v. *Weinberger*, *supra*, 401 F. Supp. at 445. To argue that disclosure to congressional committees is not expressly prohibited is to argue that disclosure to *any* person or entity is not expressly prohibited because § 301(j) does not list those to whom disclosure may not be made. If there is an exception for disclosures to Congress it must therefore be implied. But we believe that the reasonable implication of the express exception for disclosure outside HEW to the courts—one coordinate branch of government—is that disclosure to the other coordinate branch of government is not permissible.

3. It is argued (at p. 5) that in view of the constitutional and statutory bases of Congress' oversight functions, it would be highly unusual for Congress to divest itself of these powers by indirection. First, we agree that it is relatively unusual for Congress to insulate certain information from congressional access. But we are here speaking of unusually sensitive information. The consideration and rejection of the proposed amendment in 1962 which would have created an express exemption for disclosures to Congress demonstrate that Congress did not believe it destructive of its investigative powers not to have access to "method or process" trade secret information.

As to the argument that Congress would be unlikely to prohibit release of information to congressional committees without expressly so stating in the statute itself, it has been the consistent position of my predecessors since at least 1909—and a position to which I adhere—that statutory restrictions upon executive agency disclosure of information are ordinarily binding even with respect to requests or demands of congressional

committees. *See* 43 Op. A.G., No. 4, at p. 3, and opinions cited.[9] But even in the absence of this body of precedent establishing such a general rule of interpretation of non-disclosure statutes, the consistent and longstanding construction of § 301(j) by the FDA, *cf. Ashland Oil, Inc.* v. *FTC*, 548 F.2d at 981-92 n.6; *Pharmaceutical Manufacturers Ass'n* v. *Weinberger*, 401 F. Supp. at 466, and the approval of that construction by the Congress furnish an independent basis for that interpretation of the particular statute involved here.

4. The foregoing argument is coupled with a reference (at pp. 5-7) to a number of statutes in which Congress has provided that sensitive national security or personal information is to be furnished only to certain named congressional committees, 1 U.S.C. § 112b; 10 U.S.C. § 1582; 26 U.S.C. § 6103(d), 6104(a)(2), or, in one case, is not to be furnished to Congress at all, 50 U.S.C. § 403g.[10] The CRS memorandum relies on these provisions for the proposition that when Congress desires to limit its own access to material, it is capable of doing so in so many words; the absence of express language to this effect in § 301(j), the argument proceeds, means that Congress' access was not to be limited. We draw just the opposite inference.

In our view, the existence of these exceptions for disclosure to the Congress reflects a congressional judgment that the otherwise absolute terms of the statutes would prohibit release to the Congress in the absence of such an exception. In recognition of the confidentiality interests involved, however, Congress has included in these statutes only a narrow exception for disclosure to the congressional committees having a particular need for the information, not to the entire Congress. Thus, the statutory provisions that limit access to a few committees are consistent with, and in fact support, the view that the prohibitions against disclosure would apply to the entire Congress in the absence of an express exception for disclosures to Congress.

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[9] This is not to say that a statute which permits or requires an agency to receive or hold information in confidence or directs it not to make information public — as opposed to prohibiting *all* disclosure outside the agency — necessarily bars the release of information to Congress. The requirement of confidentiality in such statutes might in some cases be met by confidential disclosures to the congressional committees. *See Ashland Oil Inc.* v. *FTC*, *supra*, 548 F.2d at 979; 43 Op. A.G., No. 5

[10] One of the provisions cited, 50 U.S.C. § 403g(b), merely provides that CIA expenditures of a confidential, extraordinary, or emergency nature shall be accounted for solely on the certificate of the Director. There is no express statement that Congress may not have access to the underlying documents supporting the expenditures. This and other certificate funding provisions are therefore examples of Congress' depriving itself of access without explicitly so stating.

5. CRS suggests (at pp. 7-8) two ways in which § 301(j) might be narrowly construed to have the effect of permitting the release here of the subpoenaed information but which are not limited to congressional requests. The first suggestion is that the section should be read only to bar an HEW official from releasing information where it would be to his "own advantage"; the second is that the section should be read to apply to disclosures only by first level collectors of information, not by the Secretary. The first argument is rebutted by the very language of § 301(j), which prohibits "using by any person to his own advantage, *or* revealing" information outside the Department or the courts. It is clear the element of personal gain applies only to personal use, not the revealing of information to others. Further, the underlying purpose of protecting private companies' property interests would not be fully served if an FDA employee could freely release trade secret information to friends, competitors, or the public as long as he realized no personal profit. The property rights of companies to which trade secret information pertained would likewise not be adequately served if anyone other than a first line collector of information in FDA could release the information whenever he chose. While the genesis of § 301(j) may have been to protect information *obtained* by government inspectors under the Act, S. Rep. No. 493, 73d Cong., 2d Sess. 21 (1934), quoted in CRS memorandum (at p. 11), Congress could not have intended to limit that protection to disclosures made by those inspectors.

6. The memorandum summarizes (at pp. 9-15) the legislative history of § 301(j) and notes that there is no affirmative indication therein that Congress intended to prohibit disclosures to the Congress. Our research has likewise uncovered no discussion in the legislative history bearing on the issue of disclosures to Congress. In view of this silence, it would seem that the express language of the section barring *any* disclosure outside HEW or the courts must control, thereby precluding congressional access. The very existence of criminal penalties and the sensitive nature of the information caution against fashioning an implied exemption for releases to persons who would apparently not be covered by the Act's criminal penalties.[11]

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[11] In a related argument, CRS suggests (at p. 8) that it is anomalous for Congress to have permitted release of § 301(j) information to HEW contractors, but not to the Congress. *See* note 2, *supra*. This exception for contractors was enacted over 35 years after the original Act and well after the administrative construction barring congressional access was well known. Moreover, contractors performing

7. CRS suggests (at p. 7) that if § 301(j) is interpreted to bar release to the Congress, "it would mean that over 100 similar confidentiality provisions could be invoked by executive agencies against congressional requests for information." The figure of 100 confidentiality provisions is drawn from a compilation in *Contempt Proceedings Against Secretary of Commerce Rogers C. B. Morton before the Subcommittee on Oversight and Investigations of the House Interstate and Foreign Commerce Committee*, 94th Cong., 1st Sess. 210-254 (1975). We do not agree with the CRS conclusion that the 100 statutes must be interpreted in the same manner as § 301(j). The interpretation of § 301(j) in this opinion turns on its express language prohibiting disclosure outside HEW or the courts, its administrative construction, and the apparent congressional approval of that construction. These factors have little bearing on the interpretation of other statutes. Each of those statutes must be addressed in light of its particular language, legislative history and administrative construction.[12]

It is my opinion that you are required by § 301(j) to decline to furnish the Subcommittee with "method or process" information entitled to protection as a trade secret.

Sincerely,

GRIFFIN B. BELL.

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work for HEW are logically in the same position as HEW employees who require access to administer the Act. Because contractors and their employees receive § 301(j) information as authorized by § 708 of the Act (the contractor section), they are subject to the criminal penalties in § 301(j) for unauthorized disclosure.

[12] A number of the other confidentiality provisions merely provide that information shall be confidential or shall not be made public, rather than prohibiting all disclosures or communications of information. Several other of the statutes listed in the compilation only prohibit use of information for gain or for fraudulent purposes, and therefore do not address the question of release to the Congress. Others contain exceptions for disclosures in the public or national interest. Section 301(j), however, bars all disclosures outside HEW or the courts and contains neither an express exception for disclosures to the Congress or a broader public interest exception.

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OPINION OF THE ATTORNEY GENERAL OF THE UNITED STATES

AUTHORITY OF THE UNITED STATES OLYMPIC COMMITTEE TO SEND AMERICAN TEAMS TO THE 1980 SUMMER OLYMPICS

The Amateur Sports Act of 1978, 36 U.S.C. § 371 *et seq.*, does not compel the United States Olympic Committee to send American teams to any Olympics.

The United States Olympic Committee may withdraw its delegation at any time before final entries are made.

The Amateur Sports Act of 1978, 36 U.S.C. § 371 *et seq.*, does not create any substantive right in an individual athlete to participate in a particular Olympic.

APRIL 10, 1980.

THE PRESIDENT.

MY DEAR MR. PRESIDENT: You have requested my opinion on the question whether the United States Olympic Committee (USOC) has a legal duty, under the Amateur Sports Act of 1978, 36 U.S.C. § 371 *et seq.*, to send a team of American athletes to the Summer Olympic Games in Moscow. For reasons stated below, it is my opinion that no tenable argument can be made that the USOC is required to send an American team to the Moscow Games. To the contrary, I believe that the Amateur Sports Act gives the USOC discretion not to send a team to any particular Olympic Games, including the Moscow Games.

There would appear to be only two conceivable bases for an argument that the USOC is legally bound to send an American team to the Moscow Games.[1] One argument might be that the Amateur Sports Act of 1978 grants no discretion to the USOC to

[1] We do not believe that Section 202(a)(5) of the Amateur Sports Act of 1978, 36 U.S.C. § 392(a)(5), to which Counsel to the President Lloyd Cutler's letter of April 9, 1980 refers, is relevant. The Olympic Games are not conducted under the auspices of the national governing bodies and need not meet the requirements of § 202(b), 39 U.S.C. § 392(b).

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refuse to send an American team to any particular Olympic Games no matter what the circumstances might be. Another argument would be that the Amateur Sports Act of 1978 creates in individual athletes a substantive legal right to compete in any particular Olympic Games if they otherwise qualify to compete on the basis of their performance in competition with other athletes for berths on our Olympic team. I will address each of these arguments in turn.

The Amateur Sports Act of 1978 recognized and established the USOC as a federally chartered corporation, *inter alia*, to "exercise exclusive jurisdiction . . . over all matters pertaining to the participation of the United States in the Olympic Games. . . ." § 104(3), 36 U.S.C. § 374(3).[2] The creation of the USOC as a corporation rather than a government agency is, I believe, important to an understanding of its powers regarding the participation of an American team in any particular Olympic Games. Although the USOC does not have all the powers normally associated with a private corporation, such as the power to issue capital stock,[3] its creation as a corporation having most of the powers associated with private corporations suggest quite strongly a congressional intent to vest in it wide discretion to take any action not specifically precluded by the Amateur Sports Act of 1978.

No provision of the Amateur Sports Act of 1978 expressly precludes the USOC's making a decision not to participate in any particular Olympic Games. Nor does any provision of that Act, by implication, preclude the USOC's making such a decision. Indeed, I believe that the 1978 Act should be read to assume congressional awareness that under the rules of the International Olympic Committee, national Olympic committees established by countries to represent them on the IOC could decide not to participate in any particular Olympic Games. For example, in 1976 numerous African nations through their respective Olympic bodies declined to send to or withdrew teams from the Summer Games in Montreal. Congress may be charged, I believe, with enacting the 1978 Act with that recent history in mind. In addition, there is no sanction if a delegation

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[2] Under § 105(a)(3), 36 U.S.C. § 375(a)(3), the USOC is empowered to "organize, finance, and control the representation of the United States in the competitions and events of the Olympic Games. . . ."

[3] 36 U.S.C. § 378.

withdraws before "final entries" have been made.[4] Moreover, the current IOC bylaws state that national Olympic committees such as the USOC —

> shall organize and supervise their country's representation at the Olympic Games. Representation covers the decision to participate . . ."[5]

Given that § 105(a)(2) of the Amateur Sports Act of 1978, 36 U.S.C. § 375(a)(2), establishes the power of the USOC to "represent the United States as its national Olympic committee in relations with the International Olympic Committee," I believe that Congress intended in enacting that Act that the USOC would be empowered to decide not to participate in any particular Olympic Games.

Under my analysis above, I believe the argument that the 1978 Act created substantive legal rights in individual athletes to participate in any particular Olympic Games may be disposed of summarily. Under § 114 of the Act, 36 U.S.C. § 382(b), the USOC "shall establish and maintain provisions for the swift and equitable resolution of disputes involving any of its members *and* relating to the opportunity of an amateur athlete . . . to participate in the Olympic Games. . . ." (Emphasis added.) Although it might be argued that Art. IX, § 1 of the USOC Constitution,[6] read literally, suggests the existence of a right of individual athletes to participate in particular Olympic Games "if selected," the language of § 114 and its legislative history contradict the suggestion that this "right" was to be viewed as a substantive restriction on the USOC's power to make the participation decision. Thus, while the report issued by the Senate committee recognized a "right to take part in the Olympic Games," the context in which that "right" was described dem-

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[4]Rule 25 of the Rules of the International Olympic Committee (1979) (IOC Rule). Although "final entries" is not defined, it appears to refer to the entry form containing the names and numbers of competitors which must be submitted to the Organizing Committee of the Olympic Games no later than ten days before the relevant Olympic competitions begin. IOC Rule 36, ¶ 4; Bylaw V, ¶ 8 to IOC Rule 24.

[5]Bylaw V, ¶ 7, to ICO Rule 24.

[6]No member of the U.S.O.C. may deny or threaten to deny any amateur athlete the opportunity to compete in the Olympic Games, the Pan-American Games, a world championship competition, or other such protected competition as defined in Article I, Section 2(g); nor may any member, subsequent to such competition, censure, or otherwise penalize, (a) any such athlete who participates in such competition, or (b) any organization which the athlete represents. The U.S.O.C. shall, by all lawful means at its disposal, protect the right of an amateur athlete to participate if selected (or to attempt to qualify for selection to participate) as an athlete representing the United States in any of the aforesaid competitions.

onstrates that Congress' concern in § 114 was to prevent athletes from being "used as pawns by one organization to gain advantage over another." S. Rep. No. 770, 95th Cong., 2d Sess. 6 (1978).[7] See also H.R. Rep No. 1627, 95th Cong., 2d Sess. 15 (1978).

In view of the historical understanding and practice regarding the power of national Olympic committees to make participation decisions and given no provision of the Amateur Sports Act of 1978 expressly or implicitly qualified that understanding, I do not believe that a tenable argument can be made that the USOC is required by law to send an American team to the Moscow Games. In reaching this conclusion, I do not mean to suggest that Congress could not, by statute, accomplish that end or otherwise dictate the course the USOC is to follow in this matter. I merely conclude that in enacting the 1978 Act, Congress implicitly recognized the preexisting understanding that the USOC, as our country's national Olympic committee, would have the power to make a decision whether to participate in particular Olympic Games.

Sincerely,

BENJAMIN R. CIVILETTI.

[7] Even if § 114 were viewed as granting a substantive right to "selected" athletes to participate in any particular Olympic Games, the legislative history of that provision indicates that the right conferred would be limited to protection from "an arbitrary rule which, in its application, restricts, for no real purpose, an athlete's opportunity to compete." S. Rep. No. 770, at 6.

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DEPOSITORY 376

OPINION OF THE ATTORNEY GENERAL OF THE UNITED STATES

APPLICABILITY OF ANTIDEFICIENCY ACT UPON A LAPSE IN AGENCY APPROPRIATION

If, after the expiration of an agency's appropriation, Congress has not enacted an appropriation for the immediately subsequent period, the agency may obligate no further funds except as necessary to bring about the orderly termination of its functions, and the obligation or expenditure of funds for any purpose not otherwise authorized by law would be a violation of the Antideficiency Act.

The manifest purpose of the Antideficiency Act is to insure that Congress will determine for what purpose the Government's money is to be spent and how much for each purpose.

APRIL 25, 1980.

THE PRESIDENT.

MY DEAR MR. PRESIDENT: You have requested my opinion whether an agency can lawfully permit its employees to continue work after the expiration of the agency's appropriation for the prior fiscal year and prior to any appropriation for the current fiscal year. The Comptroller General, in a March 3, 1980 opinion, concluded that, under the so-called Antideficiency Act, 31 U.S.C. § 665(a), any supervisory officer or employee, including the head of an agency, who directs or permits agency employees to work during any period for which Congress has not enacted an appropriation for the pay of those employees violates the Antideficiency Act. Notwithstanding that conclusion, the Comptroller General also took the position that Congress, in enacting the Antideficiency Act, did not intend federal agencies to be closed during periods of lapsed appropriations. In my view, these conclusions are inconsistent. It is my opinion that, during periods of "lapsed appropriations," no funds may be expended except as necessary to bring about the orderly termination of an agency's functions, and that the obligation or expenditure of funds for any purpose not otherwise authorized by

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law would be a violation of the Antideficiency Act.

Section 665(a) of Title 31 forbids any officer or employee of the United States to:

> involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.

Because no statute permits federal agencies to incur obligations to pay employees without an appropriation for that purpose, the "authorized by law" exception to the otherwise blanket prohibition of § 665(a) would not apply to such obligations.[1] On it's face, the plain and unambiguous language of the Antideficiency Act prohibits an agency from incurring pay obligations once its authority to expend appropriations lapses.

The legislative history of the Antideficiency Act is fully consistent with its language. Since Congress, in 1870, first enacted a statutory prohibition against agencies incurring obligations in excess of appropriations, it has amended the Antideficiency Act seven times.[2] On each occasion, it has left the original prohibition untouched or reenacted the prohibition in substantially the same language. With each amendment, Congress has tried more effectively to prohibit deficiency spending by requiring, and then requiring more stringently, that agencies apportion their spending throughout the fiscal year. Significantly, although Congress, from 1905 to 1950, permitted agency heads to waive their agencies' apportionments administratively, Congress never permitted an administrative waiver of the prohibition against incurring obligations in excess or advance of appropriations. Nothing in the debates concerning any of the amendments to or reenactments of the original prohibition has ever suggested an implicit exception to its terms.[3]

The apparent mandate of the Antideficiency Act notwith-

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[1] An example of a statute that would permit the incurring of obligations in excess of appropriations is 41 U.S.C. § 11, permitting such contracts for "clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies" for the Armed Forces. *See* 15 Op. A.G. 299. *See also* 25 U.S.C. § 99 and 31 U.S.C. § 668.

[2] Act of March 3, 1905, Ch. 1484, § 4, 33 Stat. 1257; Act of Feb. 27, 1906, Ch. 510, § 3, 34 Stat. 48; Act of Sept. 6, 1950, Ch. 896, § 1211, 64 Stat. 765; Pub. L. 85-170, § 1401, 71 Stat. 440 (1957); Pub. L. 93-198, § 421, 87 Stat. 799 (1973); Pub. L. 93-344, § 1002, 88 Stat. 332 (1974); Pub. L. 93-618, § 175(aX2), 88 Stat. 2011 (1975).

[3] The prohibition against incurring obligations in excess of appropriations was enacted in 1870, amended slightly in 1905 and 1906, and reenacted in its modern version in 1950. The relevant legislative debates occur at Cong. Globe, 41st Cong., 2d Sess. 1553, 3331 (1870); 39 Cong. Rec. 3687-692, 3780-783 (1905); 40 Cong. Rec. 1272-286, 1623-624 (1906); 96 Cong. Rec. 6725-731, 6835-837, 11369-370 (1950).

standing, at least some federal agencies, on seven occasions during the last 30 years, have faced a period of lapsed appropriations. Three such lapses occurred in 1952, 1954, and 1956.[4] On two of these occasions, Congress subsequently enacted provisions ratifying interim obligations incurred during the lapse.[5] However, the legislative history of these provisions does not explain Congress' understanding of the effect of the Antideficiency Act on the agencies that lacked timely appropriations.[6] Neither are we aware that the Executive branch formally addressed the Antideficiency Act problem on any of these occasions.

The four more recent lapses include each of the last four fiscal years, from fiscal year 1977 to fiscal year 1980. Since Congress adopted a fiscal year calendar running from October 1 to September 30 of the following year, it has never enacted continuing appropriations for all agencies on or before October 1 of the new fiscal year.[7] Various agencies of the Executive branch and the General Accounting Office have internally considered the resulting problems within the context of their budgeting and accounting functions. Your request for my opinion, however, apparently represents the first instance in which this Department has been asked formally to address the problem as a matter of law.

I understand that, for the last several years, the Office of Management and Budget (OMB) and the General Accounting Office (GAO) have adopted essentially similar approaches to the

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[4] In 1954 and 1956, Congress enacted temporary appropriations measures later than July 1, the start of fiscal years 1955 and 1957. Act of July 6, 1954, ch. 460, 68 Stat. 448; Act of July 3, 1956, ch. 516, 70 Stat. 496. In 1952, Congress enacted, two weeks late, supplemental appropriations for fiscal year 1953 without having previously enacted a temporary appropriations measure. Act of July 15, 1952, ch. 758, 66 Stat. 637.

[5] Act of July 15, 1952, ch 758, § 1414, 66 Stat. 661; Act of Aug. 26, 1954, ch. 935, § 1313, 68 Stat. 831.

[6] In 1952, no temporary appropriations were enacted for fiscal year 1953. The supplemental appropriations measure enacted on July 15, 1952 did, however, include a provision ratifying obligations incurred on or since July 1, 1952. Act of July 15, 1952, ch. 758, § 1414, 66 Stat. 661. The ratification was included, without elaboration, in the House Committee-reported bill, H. Rep. No. 2316, 82d Cong., 2d Sess. 69 (1952), and was not debated on the floor.

In 1954, a temporary appropriations measure for fiscal year 1955 was presented to the President on July 2 and signed on July 6. Act of July 6, 1954, ch. 460, 68 Stat. 448. The Senate Committee on Appropriations subsequently introduced a floor amendment to the eventual supplemental appropriations measure that ratified obligations incurred on or after July 1, 1954, and was accepted without debate. Act of Aug. 26, 1954, ch. 935, § 1313, 68 Stat. 831. 100 Cong. Rec. 13065 (1954).

In 1956, Congress's temporary appropriations measure was passed on July 2 and approved on July 3. Act of July 3, 1956, ch. 516, 70 Stat. 496. No ratification measure for post-July 1 obligations was enacted.

[7] Pub. L. 94-473, 90 Stat. 2065 (Oct. 11, 1976); Pub. L. 95-130, 91 Stat. 1153 (Oct. 13, 1977); Pub. L. 95-482, 92 Stat. 1603 (Oct. 18, 1978); Pub. L. 96-86, 93 Stat. 656 (Oct. 12, 1979).

administrative problems posed by the Antideficiency Act. During lapses in appropriations during this Administration, OMB has advised affected agencies that they may not incur any "controllable obligations" or make expenditures against appropriations for the following fiscal year until such appropriations are enacted by Congress. Agencies have thus been advised to avoid hiring, grantmaking, nonemergency travel, and other nonessential obligations.

When the General Accounting Office suffered a lapse in its own appropriations last October, the Director of General Services and Controller issued a memorandum, referred to in the Comptroller General's opinion,[8] indicating that GAO would need "to restrain our FY 1980 obligations to only those essential to maintain day-to-day operations." Employees could continue to work, however, because of the Director's determination that it was not "the intent of Congress that GAO close down."

In my view, these approaches are legally insupportable. My judgment is based chiefly on three considerations.

First, as a matter of logic, any "rule of thumb" excepting employee pay obligations from the Antideficiency Act would have to rest on a conclusion, like that of the Comptroller General, that such obligations are unlawful, but also authorized. I believe, however, that legal authority for continued operations either exists or it does not. If an agency may infer, as a matter of law, that Congress has authorized it to operate in the absence of appropriations, then in permitting the agency to operate, the agency's supervisory personnel cannot be deemed to violate the Antideficiency Act. Conversely, if the Antideficiency Act makes it unlawful for federal agencies to permit their employees to work during periods of lapsed appropriations, then no legislative authority to keep agencies open in such cases can be inferred, at least from the Antideficiency Act.

Second, as I have already stated, there is nothing in the language of the Antideficiency Act or in its long history from which any exception to its terms during a period of lapsed appropriations may be inferred. Faithful execution of the laws cannot rest on mere speculation that Congress does not want the Executive branch to carry out Congress' unambiguous mandates.

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[8]The entire memorandum appears at 125 Cong. Rec. S13784 (daily ed. Oct. 1, 1979) [remarks of Sen. Magnuson].

It has been suggested, in this regard, that legislative intent may be inferred from Congress' practice in each of the last four years of eventually ratifying obligations incurred during periods of lapsed appropriations if otherwise consistent with the eventual appropriations.[9] Putting aside the obvious difficulty of inferring legal authority from expectations as to Congress' future acts, it appears to me that Congress' practice suggests an understanding of the Antideficiency Act consistent with the interpretation I have outlined. If legal authority exists for an agency to incur obligations during periods of lapsed appropriations, Congress would not need to confirm or ratify such obligations. Ratification is not necessary to protect private parties who deal with the Government. So long as Congress has waived sovereign immunity with respect to damage claims in contract, 28 U.S.C. §§ 1346, 1491, the *apparent* authority alone of government officers to incur agency obligations would likely be sufficient to create obligations that private parties could enforce in court. The effect of the ratifying provisions seems thus to be limited to providing *legal* authority where there was none before, implying Congress' understanding that agencies are not otherwise empowered to incur obligations in advance of appropriations.

Third, and of equal importance, any implied exception to the plain mandate of the Antideficiency Act would have to rest on a rationale that would undermine the statute. The manifest purpose of the Antideficiency Act is to insure that Congress will determine for what purposes the Government's money is to be spent and how much for each purpose. This goal is so elementary to a proper distribution of governmental powers that when the original statutory prohibition against obligations in excess of appropriations was introduced in 1870, the only responsive comment on the floor of the House was, "I believe that is the law of the land now." Cong. Globe, 41st Cong., 2d Sess. 1553 (1870) [remarks of Rep. Dawes].

Having interpreted the Antideficiency Act, I would like to outline briefly the legal ramifications of my interpretation. It follows first of all that, on a lapse in appropriations, federal agencies may incur no obligations that cannot lawfully be funded from prior appropriations unless such obligations are

[9] Pub. L. 94-473, § 108, 90 Stat. 2066 (1976); Pub. L. 95-130, § 108, 91 Stat. 1154 (1977); Pub. L. 95-482, § 108, 92 Stat. 1605 (1978); Pub. L. 96-86, § 117, 93 Stat. 662 (1979).

otherwise authorized by law. There are no exceptions to this rule under current law, even where obligations incurred earlier would avoid greater costs to the agencies should appropriations later be enacted.[10]

Second, the Department of Justice will take actions to enforce the criminal provisions of the Act in appropriate cases in the future when violations of the Antideficiency Act are alleged. This does not mean that departments and agencies, upon a lapse in appropriations, will be unable logistically to terminate functions in an orderly way. Because it would be impossible in fact for agency heads to terminate all agency functions without incurring any obligations whatsoever in advance of appropriations, and because statutes that impose duties on government officers implicitly authorize those steps necessary and proper for the performance of those duties, authority may be inferred from the Antideficiency Act itself for federal officers to incur those minimal obligations necessary to closing their agencies. Such limited obligations would fall within the "authorized by law" exception to the terms of § 665(a).

This Department will not undertake investigations and prosecutions of officials who, in the past, may have kept their agencies open in advance of appropriations. Because of the uncertainty among budget and accounting officers as to the proper interpretation of the Act and Congress' subsequent ratifications of past obligations incurred during periods of lapsed appropriations, criminal sanctions would be inappropriate for those actions.

Respectfully,

BENJAMIN R. CIVILETTI.

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[10] See 21 Op. A.G. 286.

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DEPOSITORY 376

OPINION OF THE ATTORNEY GENERAL OF THE UNITED STATES

GENERAL EDUCATION PROVISIONS ACT—CONGRESS' DISAPPROVAL OF DEPARTMENT OF EDUCATION REGULATIONS BY RESOLUTIONS NOT PRESENTED TO THE PRESIDENT IS UNCONSTITUTIONAL

Section 431 of the General Education Provisions Act, 20 U.S.C. § 1232(d), which purports to authorize Congress, by concurrent resolutions that are not to be presented to the President for his approval or veto, to disapprove Department of Education regulations for education programs it administers, is unconstitutional.

Legislative veto devices deny the President his power under Art. I, § 7 of the Constitution, to veto legislation, interfere with his duty under Art. II, § 3, faithfully to execute the laws, and arrogate to Congress power that is constitutionally reserved to the judicial branch to interpret existing law.

The Congressional disapproval provisions of the General Education Provisions Act, 20 U.S.C. § 1232(d), are severable from the substantive rulemaking authorities conferred by the Education Amendments of 1978, P.L. 95–561, 92 Stat. 2143.

The Attorney General must scrutinize with caution any claim that he or any executive officer may decline to defend or enforce a statute whose constitutionality is merely in doubt. At the same time, the Executive is required to enforce the Constitution and to preserve the integrity of its functions against unconstitutional encroachments.

JUNE 5, 1980.

THE SECRETARY OF EDUCATION.

MY DEAR MADAM SECRETARY: I am responding to your request for my opinion regarding the constitutionality of section 431 of the General Education Provisions Act (GEPA), 20 U.S.C. § 1232(d). That provision purports to authorize Congress, by concurrent resolutions that are not to be submitted to the President for his approval or veto, to disapprove final regulations promulgated by you for education programs administered by the Department of Education. Acting under this authority, Congress has recently disapproved regulations concerning four programs

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of your Department.[1] For reasons set forth below, I believe that § 431 is unconstitutional and that you are entitled to implement the regulations in question in spite of Congress' disapproval.

I.

Under 20 U.S.C. § 1232(d), your Department is required, when it promulgates any final regulation for an "applicable program,"[2] to transmit that regulation to the Speaker of the House and to the PResident of the Senate. This section further provides:

> Such final regulation shall become effective not less than forty-five days after such transmission unless the Congress shall, by concurrent resolution, find that the final regulation is inconsistent with the Act from which it derives its authority, and disapprove such final regulation.

In short, the two Houses of Congress can, without Presidential participation, prevent the Executive from executing substantive law previously enacted by the Congress with respect to education programs. Moreover, § 1232(d), on its face, purports to delegate to the two Houses of Congress the constitutional function historically reserved to the courts to ensure that the execution of the law by the

[1] H. Con. Res. 318, 96th Cong., 2d Sess. (1980), disapproves regula..ons issued under § 451 of the GEPA, 20 U.S.C. § 1234, pertaining to the operations of the Education Appeal Board. 45 Fed. Reg. 22634 (1980). H. Con. Res. 319, 96th Cong., 2d Sess. (1980), disapproves regulations issued under § 322 of the Elementary and Secondary Education Act of 1965 [ESEA], 20 U.S.C. § 2962, pertaining to arts education. 45 Fed. Reg. 22742 (1980). H. Con. Res. 332, 96th Cong., 2d Sess. (1980), disapproves regulations issued under §§ 346–48 of the ESEA, 20 U.S.C. §§ 3001–03, pertaining to law-related education. 45 Fed. Reg. 27880 (1980). S. Con. Res. 91, 96th Cong., 2d Sess. (1980), disapproves regulations issued under Title IV of the ESEA, 20 U.S.C. §§ 3081 *et seq.*, pertaining to grants to state and local education agencies for educational resources. 45 Fed. Reg. 23602 (1980). The statutory authority for issuance of these regulations was added to the GEPA or the ESEA by the Education Amendments of of 1978, Pub. L. 95–561, 92 Stat. 2143.

[2] Under the GEPA, an "applicable program" is "any program for which an administrative head of an education agency has administrative responsibility as provided by law or by delegation or authority pursuant to law." 20 U.S.C. § 1221(b) and (c)(1)(A). Two Department regulations recently disapproved by Congress were promulgated originally by the Commissioner of Education, under the former Department of Health, Education, and Welfare. The Commissioner's functions, however, were transferred to you under the Department of Education Organization Act, § 301(a)(1), Pub. L. No. 96–88, 93 Stat. 677 (1979). All four programs involved are now administered under your authority.

Executive is consistent with the statutory bounds established in the legislative process.

In designing a federal government of limited powers, the Framers of the Constitution were careful to assign the powers of government to three separate, but coordinate branches. They vested legislative power in the Congress, the power to execute the laws passed by the Congress in the Executive, and the power finally to say what the law is in the Judiciary. In ordering these relationships, the Framers were careful, in turn, to limit each branch in the exercise of its powers. The power of Congress to legislate was not left unrestrained, but was made subject to the President's veto. Neither was the President's power to execute the law left absolute, but Congress was empowered to constrain any executive action not committed by the Constitution exclusively to the Executive by passing legislation on that subject. Should such legislation be vetoed by the President, Congress could use its ultimate authority to override the President's veto. Both of the political branches were, in turn, to be checked by the courts' power to take jurisdiction to determine the existence of legislative authority for executive actions, and to review the acts of both Congress and the Executive for constitutionality. This, in simplest form, is our carefully balanced constitutional system.

The legislative veto mechanism in § 1232(d) upsets the careful balance devised by the Framers. Viewed as "legislative" acts, legislative vetoes authorize congressional action that has the effect of legislation but deny to the President the opportunity to exercise his veto power under Art. I, § 7 of the Constitution. Viewed as interpretive or executive acts, legislative vetoes give Congress an extra-legislative role in administering substantive statutory programs that impinges on the President's constitutional duty under Art. II, § 3, of the Constitution faithfully to execute the laws. Viewed as acts of quasi-judicial interpretation of existing law, legislative vetoes arrogate to the Congress power reserved in our constitutional system for the non-political Judicial Branch. Thus, however they may be characterized, legislative vetoes are unconstitutional.

A. *The Presentation Clauses*

As illustrated by the four recent exercises of legislative veto power under § 1232(d), legislative veto devices are functionally equivalent to legislation because they permit Congress, one of its Houses, or even, on occasion, one or two of its committees, to block the execution of the law by the Executive for any reason, or indeed, for no reason at all. Under § 1232(d), the two Houses of Congress could, by passing successive concurrent resolutions, bring to a halt substantive programs, the authority for which was enacted by prior Congresses with the participation of the President. Such legislative veto devices cannot stand in the face of the language and history of the Presentation Clauses, Art. I, § 7, cls. 2 and 3.

Clause 2 provides that every bill that passes the House and the Senate shall, before it becomes law, be presented to the President for his approval or disapproval.[3] If disapproved, a bill does not become law unless repassed by a two-thirds vote of each House.

At the Philadelphia Convention of 1787, the Framers considered and explicitly provided for the possibility that Congress, by passing "resolutions" rather than bills, might attempt to evade the requirement that proposed legislation be presented to the President. During the debate on Art. I, § 7, James Madison observed:

> If the negative of the President was confined to *bills;* it would be evaded by acts under the form and name of Resolutions, votes &c—[and he] proposed that "or resolve" should be added after *"bill"* . . . , with an exception as to votes of adjournment &c.

2 M. Farrand, *Records of the Federal Convention of 1787* 301 (rev. ed. 1937).

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[3] Clause 2 provides, in pertinent part:

> Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two th. ds of that House, it shall become a Law.

Madison's notes indicate that "after a short and rather confused conversation on this subject," his proposal was at first rejected. However, at the commencement of the following day's session, Mr. Randolph, "having thrown into a new form" Madison's proposal, renewed it. It passed by vote of 9–1. *Id.*, 301–35. Thus, the Constitution today provides, in addition to Clause 2 of § 7 dealing with the passage of "bills," an entirely separate clause, Art. I, § 7, cl. 3, as follows:

> Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed by the Case of a Bill.

I believe it is manifest, from the wording of Clause 3 and the history of its inclusion in the Constitution as a separate clause apart from the clause dealing with "bills," that its purpose is to protect against *all* congressional attempts to evade the President's veto power.[4] The function of the Congress in our constitutional system is to enact laws, and all final congressional action of public effect, whether or not it is formally referred to as a bill, resolution, order or vote, must follow the procedures prescribed in Art. I, § 7, including presentation to the President for his approval or veto.

B. *The Separation of Powers*

(1) *Executing the Law*

The principle of separation of powers underlying the structure of our constitutional form of government gener-

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[4]The President was given his veto power, in part, in order that he might resist any encroachment on the integrity of the Executive Branch. *See The Federalist*, No. 48. His participation in the approval of legislation is also crucial because of his unique constitutional status as representative of all the people. As Chief Justice Taft stated in 1926:

> The President is a representative of the people just as the members of the Senate and of the House are, and it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than the members of either body of the Legislature. . . .

Myers v. *United States*, 272 U.S. 52, 123 (1926).

ally provides for the separation of powers among the Legislative, Executive, and Judicial Branches, and provides for "checks and balances" to maintain the integrity of each of the three branches' functions. Generally speaking, the separation of powers provides that each of the three branches must restrict itself to its allocated sphere of activity: legislating, executing the law, or interpreting the law with finality. This is not to say that every governmental function is inherently and of its very nature either legislative, executive, or judicial. Some activity might be performed by any of the three branches—and in that situation it is up to Congress to allocate the responsibility. *See, e.g., Wayman* v. *Southard*, 10 Wheat. 1, 42–43, 46 (1825) (Chief Justice Marshall). Once Congress, by passing a law, has performed that function of allocating responsibility, however, the separation of powers requires that Congress cannot control the discharge of those functions assigned to the Executive or the Judiciary, except through the plenary legislative process of amendment and repeal.

The underlying reason, well stated by James Madison, is that otherwise the concentration of executive and legislative power in the hands of one branch might "justly be pronounced the very definition of tyranny." *The Federalist*, No. 47, at 324 (Cooke ed. 1961). The shifting of executive power to the Legislative Branch which would be occasioned by these legislative veto devices is, I believe, undeniable; the concentration of this blended power is precisely what the Framers feared and what they set about to prevent.

The Constitution's overall allocations of power may not be altered under the guise of an assertion by the Congress of its power to pass laws that are "necessary and proper for carrying into Execution . . . Powers vested by [the] Constitution in the Government of the United States, or in any Department or Officer thereof," Art. I, § 8, cl. 18.[5] As

[5] It is fundamental to our concept of limited federal government that power exercised by the Legislative, Executive and Judical Branches be traced to a provision of the Constitution or to a statute which is expressly or impliedly authorized by a provision of the Constitution. Thus, a source of authority for Congress to exercise power under legislative veto devices must be found in the Constitution in order for that authority to be recognized as legitimate. As we demonstrate below, the Necessary and Proper Clause does not grant such authority; nor does any other provision of the Constitution.

the Supreme Court made clear in *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the exercise of power by Congress pursuant to the Necessary and Proper Clause is limited both by other express provisions of the Constitution and by the principles of separation of powers.

In *Buckley*, it was argued that officers of the Congress could, under the Necessary and Proper Clause, appoint commissioners of the Federal Election Commission, notwithstanding the fact that Art. II, § 2, cl. 2 of the Constitution placed the appointment power in the President. With regard to the relationship between the exercise of power under the Necessary and Proper Clause and other provisions of the Constitution, the Court stated the rule as follows:

> Congress could not, merely because it concluded that such a measure was "necessary and proper" to the discharge of its substantive legislative authority, pass a bill of attainder or *ex post facto* law contrary to the prohibitions contained in section 9 of Art. I. No more may it vest in itself, or in its officers, the authority to appoint officers of the United States when the Appointments Clause by clear implication prohibits it from doing so.

424 U.S. at 135.

The Constitution establishes the President's veto power as clearly as it establishes the appointment power or prohibits bills of attainder and *ex post facto* laws. Under *Buckley*, the only reasonable implication of the Framers' inclusion of Art. I, § 7, cl. 3, in the Constitution is that the Necessary and Proper Clause is not a source of power for evasion of these specific limitations through the enactment of legislative veto devices. I would add that, in reaching its holding in *Buckley*, the Court considered and relied upon earlier cases that seem most relevant to the constitutionality of legislative veto devices. In quoting from *Myers* v. *United States*, 272 U.S. 52 (1926), the Court recognized the relationship between the grant of executive power to the President and the issue before it. 424 U.S. at 135–136.[6] I

[6] The Court went on, in holding the appointment of Federal Election Commission members by officers of Congress to be unconstitutional, to quote the following language from its earlier decision in *Springer* v. *Philipine Islands*, 227 U.S. 189, 202 (1928):

believe that *Buckley* and the cases relied on by the *Buckley* Court foreclose arguments that the Necessary and Proper Clause grants Congress the power to provide for legislative veto devices.

Because to characterize the power exercised by the two Houses under § 1232(d) as "legislation" would necessarily require Congress to respect the President's veto power by presenting its resolutions for his approval, it is necessary for proponents of such power to deny that the power is "legislation" in the constitutional sense. They argue instead that the device is a means for Congress to oversee the execution of the law by the Executive, in aid of undoubted constitutional powers to pass legislation and appropriations. Such an argument, however, cannot withstand scrutiny. Without a legislative veto, the regulations of your Department, unless invalidated by a court, would have the force of law. In depriving them of that force, the necessary effect of a legislative veto is to block further execution of a statutory program until the Executive promulgates further regulations in compliance with the current views of a Congress that may well be different from the Congress that enacted the substantive law.[7] The difference between this kind of congressional "oversight" and the legitimate oversight powers of Congress in their effect on the constitutional allocation of powers could not be more profound. By its nature, for example, the exercise of a legislative veto would be beyond judicial review because the exercise of such powers could be held to no enforceable standards. In exercising its veto, I believe it

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> Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions. It is unnecessary to enlarge further upon the general subject, since it has so recently received the full consideration of this court. *Myers* v. *United States*, ...
>
> Not having the power of appointment, unless expressly granted or incidental to its powers, the legislature cannot engraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection, though the case might be different if the additional duties were devolved upon an appointee of the Executive.

[7] In such a situation, the Executive, as a practical matter, may be giving up a measure of authority granted by the statute being administered which the courts in an appropriate case would have found to have been delegated to the Executive, if Congress had not intervened. Such a diminution of authority must, in my view, be viewed analytically as a repeal of the substantive statute to that extent.

clear that Congress is dictating its interpretation of the permissible bounds for execution of an existing law; a result that can be accomplished only by legislation.

The foregoing discussion demonstrates the flaw in the argument, occasionally made, that the doctrine of separation of powers protects the Executive Branch only in areas that are inherently executive, and that Congress may reserve to itself control over activities entrusted to the Executive which are not "truly" executive in nature. This reasoning overlooks the basic truth that there are few activities that are clearly executive, legislative, or judicial. The first two categories, in particular, overlap to an enormous extent. Much, if not indeed most, executive action can be the subject of legislative prescription. To contend, therefore, that Congress can control the Executive whenever the Executive is performing a function that Congress might have undertaken itself is to reduce the doctrine of separation of powers to a mere shadow.

The test is not whether an activity is inherently legislative or executive but whether the activity has been committed to the Executive by the Constitution and applicable statutes. In other words, the Constitution provides for a broad sweep of possible congressional action; but once a function has been delegated to the Executive Branch, it must be performed there, and cannot be subjected to continuing congressional control except through the constitutional process of enacting new legislation.

2. *Interpreting the Law*

Section 1232(d) authorizes disapproval of a regulation by concurrent resolution if Congress "find[s] that the final regulation is inconsistent with the Act from which it derives its authority . . . ." That section, on its face, purports to vest in the two Houses of Congress an extra-legislative power to perform the function reserved by the Constitution to the courts of determining whether a particular executive act is within the limits of authority established by an existing statute.[8] It is clear that the President con-

[8] The role of the Judiciary in requiring conformance by the two political branches to constitutional standards and in confining the Executive to execution of the law within the

stitutionally can be overruled in his interpretation of the law, by the courts and by the Congress. But the Congress can do so only by passing new legislation, and passing it over the President's veto if necessary. That is the constitutional system.

Proponents of the legislative veto, however, argue that such devices actually fortify the separation of powers by providing Congress with a check on an agency's exercise of delegated power. No doubt congressional review provides a check on agency action, just as committee review or committee chairman review would provide a check. But such review involves the imposition on the Executive of a particular interpretation of the law—the interpretation of the Congress, or one House, or one committee, or one chairman—without the check of the legislative process which includes the President's veto. In that case Congress is either usurping the power of the President to execute the law, or of the courts to construe it; or Congress is legislating. If it is legislating, the Constitution is explicit that the President must have the opportunity to participate in that process by vetoing the legislation.

II.

Because it is my opinion that § 1232(d) is unconstitutional, it is necessary for me to consider whether that provision is severable from the underlying grants of statutory authority upon which the regulations promulgated by you were based. Section 1232(d) was enacted in 1974. When the various authorities for the four regulations disapproved by Congress were enacted in the Education Amendments of

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bounds established by statute is too familiar to require elaboration. It is therefore not surprising that the Supreme Court has consistently taken the position that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one," thus denying any Congress any binding role in the interpretation of an earlier Congress' acts. *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348–49 (1963), quoting *United States* v. *Price*, 361 U.S. 304, 313 (1960). The Court, in taking this position, has recognized both the political nature of the legislative process and differences between the functional competencies of the courts and Congress. See *United States* v. *United Mine Workers of America*, 330 U.S. 258, 282 (1947). I note that in these three cases in which the Court cautioned against permitting the views of a subsequent Congress to influence interpreting the intent of an earlier Congress in passing a particular statute, the Court was faced with situations in which the subsequent expression of Congress' view came in the context of the passage of legislation. Thus, in those cases, even any marginal relevance of the subsequent congressional expression would have been subject to the President's veto under Art. I, § 7.

1978, Congress gave no indication that the substantive rulemaking powers delegated to you were to be extinguished if the legislative veto device in § 431 were to be found unconstitutional. Thus, I conclude that § 431 is severable from this basic grant of substantive power. *See, e.g., Champlin Refining Co.* v. *Corporation Commission of Oklahoma*, 286 U.S. 210, 234 (1932), quoted with approval in *Buckley* v. *Valeo, supra*, 424 U.S. at 108.

III.

Within their respective spheres of action the three branches of Government can and do exercise judgment with respect to constitutional questions, and the Judicial Branch is ordinarily in a position to protect both the Government and the citizenry from unconstitutional action, legislative or executive; but only the Executive Branch can execute the statutes of the United States. For that reason alone, the Attorney General must scrutinize with caution any claim that he or any other executive officer may decline to defend or enforce a statute whose constitutionality is merely in doubt. Any claim by the Executive to a power of nullification, even a qualified power, can jeopardize the equilibrium established by our constitutional system.

At the same time, the Executive's duty faithfully to execute the law embraces a duty to enforce the fundamental law set forth in the Constitution as well as a duty to enforce the law founded in the Acts of Congress, and cases arise in which the duty to the one precludes the duty to the other. In rendering this opinion on the constitutionality of § 431, I have determined that the present case is such a case.

Section 431 intrudes upon the constitutional prerogatives of the Executive. To regard these concurrent resolutions as legally binding would impair the Executive's constitutional role and might well foreclose effective judicial challenge to their constitutionality.[9] More important, I believe

[9] The history of so-called "legislative veto" devices, of which § 431 is the GEPA is one, illustrates the difficulty in achieving judicial resolution of such an issue. Although Congress enacted the first such mechanism in 1932, only a few reported cases have potentially involved the constitutional question inherent in the legislative veto, and a court has reached the issue

that your recognition of these concurrent resolutions as legally binding would constitute an abdication of the responsibility of the Executive Branch, as an equal and coordinate branch of Government with the Legislative Branch, to preserve the integrity of its functions against constitutional encroachment. I, therefore, conclude that you are authorized to implement these regulations.

Sincerely,

BENJAMIN R. CIVILETTI.

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only once. In *Atkins* v. *United States*, 556 F. 2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978), the Court of Claims held, four-to-three, that the provision of the Federal Salary Act of 1967, 2 U.S.C. § 359(1)(B), which permits one House of Congress to disapprove the President's proposed pay schedule under the Act, is not unconstitutional, and that the Senate's veto of a proposed judicial salary increase was therefore lawful. This Department, representing the United States, argued that the veto was unconstitutional, but that, because the veto authority was not severable from the remainder of the Salary Act, the plaintiffs had no right to additional pay. The latter view was sustained in *McCorkle* v. *United States*, 559 F.2d 1258 (4th Cir. 1977), *cert. denied*, 434 U.S. 1011 (1978).

Other cases in which the validity of a legislative veto device has been argued include *Chadha* v. *Immigration and Naturalization Service*, No. 77-1702 (9th Cir., argued April 10, 1978); and *Clark* v. *Valeo*, 599 F.2d 642 (D.C. Cir. aff'd, 431 U.S. 950 (1977) (issue not ripe for determination).

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OPINION OF THE ATTORNEY GENERAL OF THE UNITED STATES

RIGHTS-OF-WAY ACROSS NATIONAL FORESTS

The Act of June 4, 1897, does not grant a right of access to owners of land surrounded by national forests, other than actual settlers, and the Secretary of Agriculture has discretionary authority to deny such access unless a right otherwise exists.

The common law doctrine of easement by necessity does not apply to land owned by the Federal Government, but a right of access may be implied from the terms of a Federal land grant in some circumstances. No statutes currently modify any such implied right found to exist.

Absent a prior existing access right, the Secretary of Agriculture may deny "adequate access" to land within a National Forest wilderness area, but must offer a land exchange as indemnity.

JUNE 23, 1980.

THE SECRETARY OF AGRICULTURE

MY DEAR MR. SECRETARY: This replies to your letter of September 18, 1979, requesting my opinion on several questions concerning access rights of private owners of land located within the boundaries of the national forests. Your letter poses the following questions:

(1) Whether the Organic Act of June 4, 1897,[1] grants to private landowners,[2] other than actual settlers, a right of ingress to and egress from their properties located within the exterior boundaries of the national forests or whether you may deny such access;

(2) Whether private landowners with property located within the exterior boundaries of the national forests have a right-of-way across national forest lands by implied easement or easement by necessity enforceable against the

[1] Act of June 4, 1897, ch. 2, § 1, 30 Stat. 36 (codified at 16 U.S.C. 478).

[2] As used in this opinion, the term "private landowners" refers to all nonfederal landowners unless otherwise indicated.

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Federal Government; and, if so, whether this right-of-way is limited to those instances in which the United States by its conveyance created a situation in which nonfederal lands are surrounded by public lands;

(3) Whether, if a right-of-way exists across national forests, it has been modified by:

(a) The Organic Act of June 4, 1897, 16 U.S.C. 478;

(b) The Wilderness Act, § 5(a), 16 U.S.C. 1134(a);

(c) The Act of October 13, 1964, 16 U.S.C. 532–538;

(d) The Montana Wilderness Study Act of 1977, § 3, 16 U.S.C. 1132 note; or

(e) any other statute; and

(4) Whether § 5(a) of the Wilderness Act, 16 U.S.C. 1134(a), authorizes you to deny access and offer as indemnity an exchange of national forest land for private land, or whether the private landowner may insist on a right of access.

I conclude, first, that the Organic Act of June 4, 1897, does not grant a right of access to owners of land surrounded by national forests, other than actual settlers, and that you have discretionary authority to deny such access, provided that a right of access does not otherwise exist. Of course, access cannot be denied arbitrarily.

Second, in my opinion, the common law doctrine of easement by necessity does not apply to land owned by the Federal Government. A right of access may be implied from the terms of a Federal land grant only if Congress intended to grant the right. This intent may be shown from the circumstances surrounding the grant, including the purpose for which it was made.

Third, none of the statutes you have asked us to consider, nor any others that we have found, would modify such a right in any case in which it is found to exist.

Fourth, I conclude that, absent a prior existing access right, you may deny "adequate access" under the Wilderness Act, but you must offer a land exchange as indemnity.

I.

Your first question is whether Congress has given pri-

vate inholders[3] a statutory right of ingress and egress with respect to their property, including a right to build roads. Congress clearly has the power to grant such statutory rights.[4] The question is whether it has done so.

Your Department concludes that the Organic Act of June 4, 1897, grants a right of access, including a right to build roads, to all owners of land surrounded by national forest reserves. Section 478, the codification of § 1 of the Act, provides:

> Nothing in sections 473 to 478, 479 to 482 and 551 of this title shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of national forests, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of Agriculture. Nor shall anything in such sections prohibit any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof. Such persons must comply with the rules and regulations covering such national forests.

In 1962, Attorney General Kennedy was asked by the Secretary of Agriculture for his opinion on the meaning of this statute. *See* 42 Op. Atty. Gen. 127 (1962). Prior to 1962, your Department interpreted the first sentence of § 478 as granting a right of access to all owners of land

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[3] An "inholder" is a landowner whose property is completely surrounded by property owned by the United States. Again, as used in this opinion the term "private inholder" refers to all nonfederal inholders.

[4] The power to control public lands is granted to Congress by the Constitution:

> The Congress shall have Power to Dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States . . . .

U.S. Const., art. IV, § 3, cl. 2. This comprehensive congressional authority over public lands includes the power to prescribe the times, conditions, and mode of transfer (*United States* v. *Gratiot*, 39 U.S. (14 Pet.) 526, 537–38 (1840)); to declare the effect of title emanating from the United States (*Bagnell* v. *Broderick*, 38 U.S. (13 Pet.) 436, 450 (1839)); and to prevent unlawful occupation of public property (*Camfield* v. *United States*, 167 U.S. 518, 525 (1897)). In *Kleppe* v. *New Mexico*, 426 U.S. 529, 539 (1976), the Court stated:"[W]hile the furthest reaches of power granted by the Property Clause have not yet been definitely resolved, we have repeatedly observed that the power over public lands thus entrusted to Congress is without limitation."

surrounded by a national forest. It reasoned that the term "ingress and egress' included the construction of wagon roads, and that the term "actual settlers" included any person or corporation owning property within the boundaries of national forests. As a result, private landowners including lumber corporations were considered to have a statutory right to build logging roads. *Id.* at 130. Attorney General Kennedy opined that the term "actual settlers" includes original settlers who reside on the land, and excludes corporations and other business entities.[5] He further concluded that the Secretary of Agriculture has discretionary authority to impose a reciprocity requirement on requests by inholders, other than actual settlers, to use existing roads or to build new roads within national forests. *Id.* at 142–45.

You have advised us that notwithstanding the 1962 opinion, your Department has continued to maintain that § 478 creates a right of access for all private inholders. This interpretation, you have informed us, has been based upon the second sentence of § 478, which was not directly addressed in the 1962 opinion. My review of the reasoning set forth in that earlier opinion, as well as my analysis of § 478 and its legislative history, convinces me that no such access right exists.

The 1962 opinion analyzed § 478 by dividing it into the following three categories: (1) ingress and egress of actual settlers; (2) construction of wagon roads and other improvements by actual settlers; and (3) entry upon the national forest for all proper and lawful purposes by any person. *Id.* at 127, 138–39. We are concerned here only with the third category because you inquire as to the rights of landowners other than actual settlers. In this category, "entry upon" may be subdivided into entry by mere ingress and egress, in particular the use of existing roads, and entry requiring construction of roads. Section 478 provides that any entry upon the forest reserve by any person is subject to the rules and regulations covering such national forests. The question now presented, therefore, is whether

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[5] Between the extremes of the original settler and corporations or business entities are intermediary of types of property owners such as heirs or assigns of an actual settler. The 1962 opinion did not consider whether those intermediary property owners are "actual settlers" within the meaning of the Act. 42 Op. Atty. Gen. 127, 138 (1962).

the Secretary's regulations may, in appropriate cases, include denial of the requested entry.

To determine correctly the scope of rights protected by the 1897 Act, it is necessary to study carefully the language of the Act itself, and its legislative history. As the legislative history is fully summarized in the 1962 opinion, I note only the aspects particularly relevant here. At the outset, it is helpful to review the sequence of events which led to the passage of the Act. During the 1800's the public entered freely upon Federal land, and Congress, although it did not provide specific legal authority for most uses of the public domain, made no serious attempt to halt such uses. *See generally* G. Robinson, The Forest Service 2–5 (1978); Claswson & Held, The Federal Lands 46 (1957). This tacit approval constituted an open invitation to the public to avail itself of the Federal land without specific authorization. Most people assumed that the United States was a temporary titleholder and that the land would eventually pass into private ownership. *See* R. Robbins, Our Landed Heritage: The Public Domain, 1776–1970, 5–6 (1976). The public land laws of the era, including preemption laws,[6] homestead laws,[7] and mining laws,[8] presumed unimpeded access to the public domain.

This policy of unimpeded access was recognized by the Supreme Court in *Buford* v. *Houtz*, 133 U.S. 320, 326 (1890), a case in which the Court considered the complaints of owners of alternate odd-numbered sections of land that

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[6] The Act of May 29, 1830, 4 Stat. 420–21, first granted preemption rights to settlers. Under its terms, any person who had settled on the public domain and had cultivated a tract of land was authorized to purchase any number of acres up to a maximum of 160 acres upon paying to the United States a minimum price for the land.

[7] The first homestead act was passed in 1862. Act of May 20, 1862, 12 Stat. 392–93. It provided that certain persons could enter unappropriated public lands and, upon satisfying certain conditions, obtain a Government patent therefor.

[8] The Mining Law of 1866 (Act of July 26, 1866, ch. 262, 14 Stat. 251) opened mineral deposits on public lands to exploration, claim, and occupation. The only specific reference to rights-of-way appeared in § 8, which granted a right-of-way for the construction of highways over public lands not reserved for public uses. The Mineral Location Law of 1872 (Act of May 10, 1872, ch. 752, 17 Stat. 91–96) did not mention access across the public domain. From the outset, however, Federal mining laws have been construed as an invitation to enter, discover, and locate claims upon public lands not withdrawn or reserved. *See, e.g., Union Oil Co.* v. *Smith*, 249 U.S. 337, 346–47 (1919); *United States* v. *Carlile*, 67 I.D. 417, 421 (1960). *See generally* J. Lonergan, Access to Intermingled Mineral Deposits, Mining Claims and Private Lands Across Surrounding Public Domain and National Forest Lands, 8 Land & Water L. Rev. 124 (1973).

sheepowners were damaging their land by driving sheep across it to reach the even-numbered sections of the public domain. The Court denied plaintiffs' request for an injunction with the following explanation:

> We are of opinion that there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States . . . shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use . . . .
>
> The whole system of the control of the public lands of the United States as it had been conducted by the Government, under acts of Congress, shows a liberality in regard to their use which has been uniform and remarkable.

133 U.S. at 326–27. The Court refused to allow the complainants, under the pretense of owning a small portion of a tract of land, to obtain control over the entire tract and thereby deny defendants their privilege to use the public domain. 133 U.S. at 322. *See also Broder* v. *Water Co.*, 101 U.S. 274, 276 (1879) (court noted conduct of Government encouraging development of mines and construction of canals and ditches on public domain); *Forbes* v. *Gracey*, 94 U.S. 762 (1876) (court noted tacit consent to enter upon the public lands for the purposes of mining); *Atchison* v. *Peterson*, 87 U.S. (20 Wall.) 507 (1874) (court noted "silent acquiescence" to the general occupation of the public lands for mining).

In the late nineteenth century, efforts expanded to protect the nation's natural resources from the results of what was perceived as overly generous land use policies. *See* R. Robbins, *supra* p. 5, at 301–24. In 1891, the Congress passed a law authorizing the President to reserve forest lands from the public domain. Act of March 3, 1891, ch. 561, § 24, 26 Stat. 1103. One provision of this Act, § 24, later known as the Forest Reserve Act of 1891, was added as an amendment by the conference committee.[9] The

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[9] Section 24 provided:

> [T]he President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.

amended bill was considered in the closing days of the Congress on an oral presentation of its terms, no printed version being available. It was approved with little debate.[10] The status of these forest reserves was not defined, nor were guidelines provided for the management of the reserves.

On February 22, 1897, President Cleveland, pursuant to the 1891 Act, issued proclamations placing approximately 20 million acres of public land in forest reserves. Presidential Proclamation Nos. 19–31, Feb. 22, 1897, 29 Stat. 893–912. Within the boundaries of the reserves were villages, patented mining claims, homestead claims of actual settlers and other developments. *See* 30 Cong. Rec. 901–02 (1897). Each of the proclamations contained the following admonition: "Warning is hereby expressly given to all persons not to enter or make settlement upon the tract of land reserved by this proclamation." *See, e.g.*, 29 Stat. 894 (1897). The proclamations also prohibited the general use of timber on the reserves, and jeopardized other theretofore legitimate activities of persons living within or near the reserves.

Congressmen from states affected by the proclamations expressed outrage at what they considered the President's hasty and ill-advised action. 30 Cong. Rec. 902 (1897). This reaction culminated in the passage of an amendment to the Sundry Civil Expense Appropriation Act, 30 Stat. 36 (1897). This amendment was designed to solve the "difficulties surrounding these forest reservations" (*Id.* at 900) and to provide for "administering the forest so reserved" (*Id.* at 909).[11] Senator Carter of Montana explained that the amendment was offered "not for the purpose of benefitting any particular individual or class of individuals, but for the purpose of permitting existing communities in the United States to enjoy the privileges which have ordinarily

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[10] Some Senators expressed concern about not knowing exactly what was in the report, but the majority felt that in the closing days of the session "there has got to be something taken for granted or else the public business cannot go forward as it should." 22 Cong. Rec. 3546–47 (1891). The brief House debate appears at 22 Cong. Rec. 3613–16 (1891).

[11] The amendment temporarily restored the withdrawn lands to the public domain by suspending the operation of the presidential proclamations for approximately one year. 30 Cong. Rec. 899–900 (1897). It also clarified the President's authority to revoke, modify, or suspend such proclamations.

been accorded to the pioneer settlers on the frontier everywhere." *Id.* at 902. Other senators also criticized the provision prohibiting entry or settlement upon the reserves. *Id.* at 910–11. Senator Allison of Iowa stated: "[I]f segregations are made I think every interest *existing at the time*, however remote it may be, should be protected." *Id.* at 911 (emphasis added). The House debate on the amendment indicates that the congressmen also were concerned about preserving existing uses of the forest reserves. *Id.* at 1007–13 (remarks of Representatives Castle, Knowles, Lacy, and DeVries).[12]

The bill was referred to a conference committee, which reported the bill without changes in or comments upon the access section. *Id.* at 1242–43. During the Senate debate on the conference report, some of the same western senators on whose behalf the amendment was introduced sought to change the clause "actual settlers residing within the boundaries of national forests" to "bona fide settlers or owners within a reservation." *Id.* at 1278–81. Senator White explained that the provision as drafted did not adequately protect all persons who had acquired title in fee from the Government. *Id.* at 1278. The amendment was defeated. *Id.* at 1285. Opponents of the amendment emphasized that there was no intent to deprive any person of access to his property, and that "whatever rights have been acquired as respects the public lands under the public land laws are reserved and preserved." *Id.* at 1283. It was noted that entry upon the forests was subject to the rules and regulations of the Secretary of Interior (who then had this administrative authority) and that such rules would not likely prevent access to a person's home. *Id.* at 1280 (remarks of Senator Berry). Notwithstanding the concession that the bill was "imperfect," the conference report was agreed to. It was pointed out that further amendment would cause substantial delay and that any evils could be corrected by subsequent legislation. *Id.* at 1282–83. The House adopted the conference report without debate on this provision. *Id.* at 1397–401.

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[12] For a complete discussion of this legislative history, see 42 Op. Atty. Gen. 127, 135–38 (1962).

This legislative history demonstrates that the effect of the second sentence of § 478 is to protect whatever rights and licenses with regard to the public domain existed prior to the reservation. We interpret the provision as a congressional declaration that the establishment of forest reserves would not alter the long-standing policy of allowing unimpeded access to the public land or interfere with the rights of persons then using the land, not as an affirmative grant of a broad right of entry to all persons. The express language of the statute provides that nothing *in the act* shall be construed to prohibit certain activities. The language grants no rights not already in existence. *See* R. Robbins, *supra* p. 5, at 323; John Ise, The United States Forest Policy 140 (1920).

The protection of "lawful" and "proper" entry upon the reserves cannot be construed to limit congressional authority to regulate such entry. No vested right to use the public domain for a particular purpose arises from the Government's mere acquiescence in such use. In *Light* v. *United States*, 220 U.S. 523 (1911), the Court wrote:

> [W]ithout passing a statute, or taking any affirmative action on the subject, the United States suffered its public domain to be used for such purposes. There thus grew up a sort of implied license that these lands, thus left open, might be used so long as the Government did not cancel its tacit consent. *Buford* v. *Houtz*, 133 U.S. 326. Its failure to object, however, did not confer any vested right on the complainant, nor did it deprive the United States of the power of recalling any implied license under which the land had been used for private purposes.

Id. at 535. *See also The Yosemite Valley Case*, 82 U.S. (15 Wall.) 77 (1872); *Frisbie* v. *Whitney*, 76 U.S. (9 Wall.) 187. 194 (1869).

Section 478 clearly subjects entry upon the national forests to reasonable regulation by the Secretary. Prior to the enactment of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701–1782, and its repeal of § 2 of the Act of June 4, 1897, 16 U.S.C. 551, insofar as the latter section applied to the issuance of rights-of-way through public lands, the Secretary was required to read § 478 and § 551 together. *United States* v. *Grimaud*, 220 U.S. 506, 515 (1911). Section 551 provides that the Secre-

tary shall "make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction . . . ." This section was held to confer upon the Secretary a "broad scope of regulation" intended to "be effective." *See* 42 Op. Atty. Gen. 127, 140, *citing Chicago Mil. & St. P. Ry.* v. *United States*, 218 F. 288, 298 (9th Cir. 1914), *aff'd*, 244 U.S. 358 (1917); *Shannon* v. *United States*, 160 F. 870, 873 (9th Cir. 1908). In *Grimaud*, the Court stated that the Secretary "is required to make provisions to protect the forest reserves from depredation and harmful uses." 220 U.S. at 552. The Secretary's authority to grant rights-of-way across national forest lands now is based on 16 U.S.C. 532–538, and FLPMA, 43 U.S.C. 1761–1771. Both statutes authorize the Secretary to protect the forest lands.[13]

This interpretation is consistent with the 1962 opinion of the Attorney General.[14] His review of the legislative history of § 478 disclosed a legislative desire to protect explicitly only the rights of ingress and egress of actual settlers. 42 Op. Atty. Gen. 127, 138. He found that entry upon the national forests by all other persons is subject to

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[13] Section 504 of FLPMA, 43 U.S.C. 1764, directs the Secretary to issue regulations with respect to the terms and conditions of the rights-of-way. Section 505, 43 U.S.C. 1765, requires, *inter alia*, that each right of way permit contain terms and conditions which will "protect the environment," "protect Federal property," and "otherwise protect the public interest in the lands traversed by the rights-of-way or adjacent thereto." The Act of October 13, 1964, 16 U.S.C. 532–538, which generally concerns the construction and maintenance of a system of roads within the national forests, authorizes the Secretary to grant permanent or temporary easements "under such regulations as he may prescribe." 16 U.S.C. 533.

[14] In 1964, in response to the Attorney General's 1962 opinion, Congress passed legislation giving the Secretary the authority to grant permanent or temporary easements over lands managed by the Department of Agriculture. Pub. L. No. 88–657, § 2, 78 Stat. 1089 (1964). The committee reports of both the House and the Senate indicate that Congress understood the Attorney General's opinion to hold that § 478 was "not to be construed as a statutory guarantee of access to private lands within the national forests." S. Rep. No. 1174, 88th Cong., 2d Sess. 4 (1964); H.R. Rep. No. 1920, 88th Cong., 2d Sess. 4 (1964). In the Senate report, the committee stated:

> It should be expressly noted that this legislation is intended neither to affirm nor to abrogate the Attorney General's interpretation of the act of June 4, 1897 (30 Stat. 36, 16 U.S.C. 478), with respect to the act's assurance or lack of assurance concerning access to private lands across national forest lands. However, the predictable effect of this legislation will be to minimize the likelihood of litigation between the United States and private landowners designed to test applications of the Attorney General's interpretation of the act of June 4, 1897. This legislation will provide to most owners of private land a satisfactory alternative to statutory assurance of access to and from their lands. The committee therefore recommends enactment of the land as amended.

Amendments which would have created a statutory right of access were rejected both in committee (S. Rep. No. 1174, at 8) and on the Senate floor. 110 Cong. Rec. 16413–15 (1964).

your rules and regulations covering the forests and discussed the scope of your regulatory authority as follows:

> As the Supreme Court pointed out in *United States* v. *Grimaud*, 220 U.S. 506, 516–17, it is your function to determine what private use of the national forests in any given case is consistent with the purposes sought to be attained by the statute. The imposition of harsh and onerous requirements not related to the benefit received or to your general responsibility to preserve and manage the national forests, might well constitute an abuse of discretion.

42 Op. Atty. Gen. at 147.

Your Department argues that it has a long-standing policy that the Secretary is without discretion to deny access under § 478, and that a change in this policy would have a drastic effect on the well-established expectations of landowners within the national forests. It is a familiar principle that interpretations made contemporaneously with the enactment of a statute and consistently followed for a long period are entitled to great weight, particularly if they have been relied on by the public. *See Zuber* v. *Allen*, 396 U.S. 168, 192–93 (1969); *Alaska S.S. Co.* v. *United States*, 290 U.S. 256, 262 (1933); *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933). Correspondingly, when an agency's interpretation has been neither consistent nor long-standing, the weight given it diminishes accordingly. *See Southeastern Community College* v. *Davis*, 422 U.S. 397, 411–12 (1979); *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 858–59 n.25 (1975). Prior to 1962, your Department relied on the first sentence of § 478 to find the same rights you now find in the second sentence. This 1962 revision of the Department's interpretation occurred almost 70 years after enactment of the statute.[15]

In any case, to the extent that my judgment is governed by the customary rules of statutory construction, I am guided by the overriding rule that the statute, and not the agency's interpretation, is conclusive. *See, e.g., Volks-*

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[15] In *Soriano* v. *United States*, 494 F.2d 681, 683 (9th Cir. 1974), the court declined to give special deference to a regulation promulgated more than 100 years after enactment of the statute.

Wagenwerk v. *Federal Maritime Commission*, 390 U.S. 261, 272 (1968). Additionally, I am persuaded by the legislative history and by the common sense rule that legislative history disclosing Congress' intent is entitled to more weight than a conflicting administrative interpretation and must control. *See Norweigian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933); Sutherland, Statutes and Statutory Construction § 49.04 (1973 & Supp. 1975).

In sum, I conclude that § 478 does not grant access rights to private inholders other than actual settlers. In my opinion, absent a right of access otherwise granted to the landowner by Congress, you may deny requested access if such denial will protect the public interest in the land to be traversed. Because you may not arbitrarily deny access to private landowners, I do not foresee that this interpretation will have a drastic effect on their expectations.

II.

Your second question is whether an inholder has an easement by necessity or other implied easement across national forest land. The conclusion in Part I (that § 478 does not grant a right of access to private property across national forest reserves, and that, absent an access right otherwise guaranteed to a landowner by Congress, § 478 allows denial of access) renders apparent the importance of this question.

In the 1962 opinion, the Attorney General stated that whether an easement by necessity lies against the Government is a complex and controversial question. While he concluded that it need not be decided at that time, the Attorney General nonetheless offered his view that such an easement does not exist over public lands. 42 Op. Atty. Gen. 127, 148. It is also my view that the common law doctrine of easement by necessity does not apply to congressional disposition of the public domain. This does not mean, however, that access cannot otherwise be implied. In my opinion, access may be implied if it is necessary to effectuate the purpose for which the land was granted.

The doctrine of easement by necessity is a common law property concept that was recently described by the Supreme Court as follows: "Where a private landowner conveys to another individual a portion of his lands in a certain area and retains the rest, it is presumed at common law that the grantor has reserved an easement to pass over the granted property if such passage is necessary to reach the retained property." *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 679 (1979).[16] Authoritative treatises on property law identify three basic prerequisites to the creation of an easement by necessity.[17] First, the titles to the two tracts in question at some time must have been held by one person. This is the unity-of-title requirement. Second, the unity of title must have been severed by a conveyance of one of the tracts. Third, the easement must be necessary in order for the owner of the dominant tenement to use his land. This necessity must exist both at the time of the severance of title and at the time of application for the exercise of the easement.[18] *See* 3 Powell on Real Property § 410, at 34–59 to 34–60 (1979); Simonton, Ways By Necessity, 25 Colum. L. Rev. 571, 573–79 (1925). Whether this doctrine applies to the government has not been resolved. Courts and commentators have differed.[19]

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[16] In *Leo Sheep*, the Court considered the question whether the United States had reserved an easement to pass over lands which had passed from Federal ownership. Your inquiry, conversely, is whether the United States granted an easement to a Federal land grantee to pass over retained lands to reach the conveyed property. The *Leo Sheep* case is discussed *infra* at pages 19–20, note 28.

[17] *See generally* 3 Powell on Real Property § 410 (1979); 2 Thompson on Real Property § 363, at 424–27 (1961 & Supp. 1978); 3 Tiffany, Law of Real Property § 793 (3d ed. 1939 Supp. 1979); Comment, Easements By Way of Necessity Across Federal Lands, 35 Wash. L. Rev. 105, 107 (1960).

[18] Courts have emphasized various factors in applying this doctrine. The Restatement of Property § 476, lists some of these factors:

(a) whether the claimant is the conveyor or the conveyee;
(b) the terms of the conveyance;
(c) the consideration given for it;
(d) whether the claim is made against a simultaneous conveyee;
(e) the extent of the necessity;
(f) whether reciprocal benefits result to the conveyor or conveyee;
(g) the manner of use of the land before conveyance;
(h) the extent to which prior use was known.

[19] *See, e.g., United States* v. *Dunn*, 478 F.2d 443 (9th Cir. 1973) (holding, with one judge dissenting, that the doctrine is applicable); *Sun Studs, Inc.* 83 I.D. 518 (1976) (holding that the doctrine is not applicable). Some commentators state that ways of necessity do not arise against the sovereign. 2 G. Thompson, Commentaries on the Law of Real Property § 362, at 417 (1961); Jones on Easements § 301, at 247 (1898). Others conclude that the doctrine should be applicable. 3 Powell on Real Property § 410 at 34–73 to 34–74 (1979); 3 Tiffany, Law of Real Property § 793 (3d ed. 1939).

To determine whether the doctrine applies to property of the Federal Government, it is necessary to determine what law controls. Here Federal law must control. The Constitution vests in Congress alone authority to dispose of and make needful rules concerning the public domain. U.S. Const., art. IV, § 3, cl. 2. As I have noted earlier in this opinion, this power is vested in Congress "without limitation." *United States* v. *Gratiot*, 39 U.S. (14 Pet.) 526, 537 (1840). *See also Kleppe* v. *New Mexico*, 426 U.S. 529, 536 (1976); *United States* v. *San Francisco*, 310 U.S. 16, 29–30 (1940). The construction of grants by the United States has been held to be a Federal, not a state, question. *United States* v. *Oregon*, 295 U.S. 1, 27–28 (1935), *Packer* v. *Bird*, 137 U.S. 661, 669 (1891).[20] With regard to implying an easement across land which the United States still holds in trust for the public, therefore, Federal law must control. *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 404 (1917).[21] Federal property can be made subject to state law only when congressional authorization is clear and unambiguous. *See EPA* v. *California ex rel. State Water Resources Control Bd.*, 426 U.S. 200, 211 (1976); *Kleppe* v. *New Mexico*, 426 U.S. 529, 536 (1976).

To determine what rights have passed under Federal law, it is necessary to interpret the statute disposing of the

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[20] When, however, the land has passed from Federal ownership, it becomes subject to the laws of the state in which it is located. *See Oregon ex rel. State Land Bd.* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372 (1977). It follows, therefore, that where title to both a dominant and servient tenement has passed from Federal ownership, the question whether the unity-of-title requirement is satisfied by prior Government ownership is a question of state law. State courts have reached differing opinions on this question. Courts in California, Florida, Indiana, Oklahoma, Tennessee, and Texas have concluded that unity of title cannot be based on prior Government ownership. *Bully Hill Copper Mining & Smelting Co.* v. *Bruson*, 4 Cal. App. 180, 87 P. 237, 238 (1906); *Guess* v. *Azar*, 57 So. 2d 443, 444 (Fla. 1952); *Continental Enterprises Inc.* v. *Cain*, 296 N.E.2d 170, 171 (Ind. 1973); *Dudley* v. *Meggs*, 153 P. 1121, 1122 (Okla. 1915); *Pearne* v. *Coal Creek Min. & Mfg. Co.*, 90 Tenn. 619, 627–28, 18 S.W. 402–04 (1891); *State* v. *Black Bros.*, 116 Tex. 615, 629–30, 297 S.W. 213, 218–19 (1927). Courts in Arkansas, Missouri and Montana have reached the opposite conclusion. *Arkansas State Highway Comm'n* v. *Marshall*, 485 S.W.2d 740, 743 (Ark. 1972); *Snyder* v. *Warford*, 11 Mo. 513, 514 (1848); *Violet* v. *Martin*, 62 Mont. 335, 205 P. 221, 223 (1922).

[21] The rules adopting state law to determine what riparian rights pass in a Federal grant are not applicable to the question of ways across Federal land. *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 411 (1917). *See Oregon ex rel. State Land Bd.* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 372 (1977); *United States* v. *Oregon*, 295 U.S. 1, 27 (1935); *Hardin* v. *Jordan*, 140 U.S. 371 (1891).

land.[22] It is a recognized principle that all Federal grants must be construed in favor of the Government "lest they be enlarged to include more than what was expressly included." *United States* v. *Grant River Dam Authority*, 363 U.S. 229, 235 (1960); *United States* v. *Union Pac. Ry.*, 353 U.S. 112, 116 (1957).[23] In *Pearsall* v. *Great No. Ry.*, 161 U.S. 646, 664 (1895), the Court wrote: "Nothing is to be taken as conceded . . . but what is given in unmistakeable terms, or by an implication equally clear. . . ." These general rules must be applied to defeat the intent of Congress, however. The Supreme Court has stated that public grants are "not to be construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication. . . ." *United States* v. *Denver & Rio Grande R.R.*, 150 U.S. 1, 14 (1893). In all cases, the intent of Congress must control. *Id. See also Missouri, K. & T. Ry.* v. *Kansas Pac. Ry.*, 97 U.S. 491, 497 (1878).

These rules dictate that if it is clear that Congress intended to grant access, such access must be acknowledged, its scope consistent with the purposes for which the grant was made.[24] An implied easement defined by the actual intent of Congress must be distinguished from an easement by necessity, which relies on a presumed intent of the parties. There are no clear uniform rules for determining the scope of an easement by necessity. In some cases, it has been held that the scope includes whatever access is necessary for any reasonable, beneficial use of the dominant tenement, not merely the use for which the grant was made. *See, e.g., New York Cent. R.R.* v. *Yarian*, 219 Ind. 477, 39 N.E.2d 604, 606 (1942); *Soltis* v. *Miller*, 444 Pa. 357, 283 A.2d 369, 370–71 (1971); *Meyers* v. *Dunn*, 49

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[22] We note that your Department, without reaching the easement-by-necessity issue, has concluded that an examination of the granting statute is essential to determining access rights. *See* Memorandum: Access to State and Private Inholdings in National Forests, at 18, U.S. Dept. of Agriculture (Oct. 31, 1979).

[23] *See also Camfield* v. *United States*, 167 U.S. 518, 524–26 (1897); *United States* v. *Clarke*, 529 F.2d 984, 986 (9th Cir. 1976).

[24] *See Curtin* v. *Benson*, 222 U.S. 78, 86 (1911). In *United States* v. *9,947.71 Acres*, 220 F. Supp. 328, 331 (D. Nev. 1963), the court recognized an implied access right for mining purposes where a mining claim owner had to cross public domain to reach his claim. *Cf. Arizona* v. *California*, 373 U.S. 546, 599–600 (1963); *Winters* v. *United States*, 207 U.S. 564, 575–77 (1908). These cases recognize an implied reservation of water rights for Indian reservations.

Conn. 71, 78 (1881); *Whittier* v. *Winkley*, 62 N.H. 338, 339–40 (1882); Jones on Easements § 323 (1898). Since the common law doctrine is based on the presumed intent of the parties, its operation may have the effect of disregarding or possibly frustrating the intention of the grantor, absent express language in the conveyance denying an easement. 2 G. Thompson, Law of Real Property § 362 (1961), *citing Lord* v. *Sanchez*, 136 Cal. App. 2d 704 289 P.2d 41 (1955); *Moore* v. *Indiana & Michigan Elec. Co.*, 299 Ind. 309, 95 N.E.2d 210 (1950). Thus, if the doctrine were allowed to operate where the Government is the grantor, the actual intent of Congress would, at the least, become irrelevant, and, in some cases, would be thwarted. Plainly, the application of the common law doctrine would be inconsistent with the established principles that the intent of Congress in disposing of Federal land must control, and that rights in Government land cannot be presumed to pass by implication.[25]

The doctrine of easements by necessity was developed to settle disputes between private parties, not disputes involving the Federal Government.[26] The Federal Government has at one time held title to over three-fourths of the territory of the United States; it today retains title to approximately one-third of the nation's land. One-third of the Nation's Land: A Report to the President and to Congress by the Public Land Law Review Comm'n, at 8 (1970). It holds property as sovereign, as well as proprietor, and exercises power beyond that which is available to a private party. *Kleppe* v. *New Mexico*, 426 U.S. 529, 539 (1976); *Light* v. *United States*, 220 U.S. 523, 536–37 (1911). Throughout its history, statutes have been enacted allow-

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[25] It is noteworthy that after the Attorney General opined in 1962 that the doctrine of easements by necessity was not enforceable across Federal land, Congress has not modified the rule. Although this generally is not strong evidence when there is no indication that Congress was aware of the ruling (*Zuber* v. *Allen*, 396 U.S. 168, 194 (1969)), it is more persuasive when, as here, congressional action directly resulted from the opinion. *See* n. 14, *supra*. *See generally Bonn* v. *Ledmar*, 368 U.S. 480, 412–13 (1962); *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 481 (1915).

[26] The doctrine has been traced to early English origins. Simonton, Ways of Necessity, 25 Colum. L. Rev. 571, 572–78 (1925). It usually has been predicated on public policy favoring land utilization and a presumption of intent. 3 Powell on Real Property ¶ 410 at 34–59 to 34–60 (1979).

ing access across its land.[27] It holds land in trust for all the people and in disposing of it is concerned with the public interest. *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409 (1917); *Causey* v. *United States*, 240 U.S. 399, 402 (1916). In *Causey*, the Court wrote that "the Government in disposing of its public lands does not assume the attitude of mere seller of real estate at its market value." *id.*

For these reasons, other doctrines applicable to private landowners have been held inapplicable to the sovereign. In *Jourdan* v. *Barrett*, 45 U.S. (4 How.) 169, 184–85 (1846), the Supreme Court held that no prescriptive rights may be obtained against the sovereign, and in *Field* v. *Seabury*, 60 U.S. (19 How.) 323, 332–33 (1856), the Court held that Government patents may not be collaterally attacked as can grants from a private party. In *United States* v. *California*, 332 U.S. 19 (1947), the Court refused to hold that the Federal Government had forfeited by laches or estoppel its interest in littoral property, stating: "The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property. . . ." *Id.* at 40.

These same reasons lead me to conclude, as did the Court in *Leo Sheep*, that the doctrine of easements by necessity as applicable to Federal lands is "somewhat strained, and ultimately of little significance" and that the "pertinent inquiry . . . is the intent of Congress."[28] A

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[27] *See, e.g.*, Act of March 3, 1875, ch. 252, § 1, 18 Stat. 482 (repealed 1976) (right of way for railroads); Act of March 3, 1891, ch. 561, § 18 (repealed 1976) (right of way for irrigation ditches and canals); Act of Jan. 21, 1895, ch. 37, § 1 (repealed 1976) (right of way for tramroads, canals, and reservoirs); Act of July 26, 1866, ch. 262, § 8, 14 Stat. 253 (repealed 1976) (right of way for highways). These statutes were repealed by the Federal Land Policy and Management Act of 1976 (FLPMA), Pub. L. No. 94–579, §§ 501–511, 90 Stat. 2776–82 (codified at 43 U.S.C. 1761–1771). FLPMA provides, with certain exceptions, that rights of way across Government land can only be obtained as provided in that act. 43 U.S.C. 1770. General and comprehensive legislation, prescribing a course of conduct to be pursued and the parties and things affected, and specifically describing limitations and exceptions, is indicative of a legislative intent that the statute should totally supersede and replace the common law dealing with the subject matter. *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 787–88 (1952); *Sneed* v. *Ruppert*, 541 P.2d 1042 (Wyo. 1975); J. Sutherland, Statutes and Statutory Construction § 50.05 (1973 & Supp. 1978).

[28] In *Leo Sheep Co.* v. *United States*, 440 U.S. 668 (1979), the Court, in holding that the Federal Government does not have a reserved easement by necessity across the land of its grantee or its grantee's successor, wrote:

grantee is entitled instead to reasonable access across Government land to use his property for the purposes for which the land grant was made, if such an access right either expressly or impliedly arises from the act authorizing the land grant.[29]

To interpret correctly congressional intent underlying a statutory land grant, it is necessary to look at the condition of the country when the grant was made, as well as the declared purpose of the grant. *Leo Sheep Co.* v. *United States*, 440 U.S. 668, 682 (1979); *Winona & St. Paul R.R.* v. *Barney*, 113 U.S. 618, 625 (1885); *Platt* v. *Union Pacif. R.R.*, 99 U.S. 48, 64 (1878). In *Superior Oil Co.* v. *United States*, 353 F.2d 34 (9th Cir. 1965), for example, the court looked to the purpose of the grant and concluded that the scope of the implied access was not broad enough to include the type of entry sought. The plaintiff oil company was a lessee of a religious mission which had received a land patent to facilitate and encourage its activities among the Indians. The land in question was surrounded by the Hopi Reservation, which the United States held in trust for the Indians. The issue on appeal was whether the oil company was entitled to move heavy equipment across the reservation to drill for oil on the leased property. In ruling that access was limited to the scope of the grant, the court stated:

> First of all, whatever right of passage a private landowner might have, it is not at all clear that it would include the right to construct a road for public access to a recreational area. More importantly, the easement is not actually a matter of necessity in this case because the Government has the power of eminent domain. Jurisdictions have generally seen eminent domain and easements by necessity as alternative ways to affect the same result. . . . [S]tate courts have held that the "easement by necessity" doctrine is not available to the sovereign.

Id. at 679–81 (footnotes omitted). Of course, the opinion in *Leo Sheep* is not alone dispositive of the question you have asked. It involved a claim by the Government grantor, not the private grantee, of an easement by necessity. The Court there did rely substantially on the power of eminent domain, and was careful not to decide the broader question of the availability of the easement-by-necessity doctrine generally. In an earlier case refusing to find a reserved way of necessity for a public easement across private land, a district court stated more broadly: "It is, in my judgment, very doubtful whether the doctrine of ways of necessity has any application to grants from the general Government under the public land laws." *United States* v. *Rindge*, 208 F. 611, 618 (S.D. Cal. 1913). *See also Sun Studs, Inc.*, 83 I.D. 518 (1976). *But see Bydlon* v. *United States*, 175 F. Supp. 891 (Ct. Cl. 1959); *Mackie* v. *United States*, 195 F. Supp. 306 (D. Minn. 1961).

[29] Of course, even without such an entitlement, a landowner may apply for an easement permit under procedures established pursuant to other statutes. *See* FLPMA, 43 U.S.C. 1761–1771; Act of October 13, 1964, 16 U.S.C. 532 *et seq.* It cannot be assumed that Congress, or Federal regulatory authorities, will execute their power in such a way as to bring about injustice. *See United States* v. *California*, 332 U.S. 19, 40 (1947).

> Certainly it cannot be said either that public policy demands or that the Indians' trustee impliedly intended a grant of a way of access across Indian lands greater in scope than was required for mission purposes and whose greater scope was necessary only in order to permit the granted lands to be used in a fashion adverse to the interests of the Indians.[30]

Although some courts that have dealt with this issue have written in terms of easements by necessity, most of them in effect have looked at the grant in question and limited access according to the purpose of the grant. The *Superior Oil* case was relied on by the Tenth Circuit in *Kinscherff* v. *United States*, 586 F.2d 159 (10th Cir. 1978), which held:

> An easement by necessity *for some purposes* could possibly have arisen when the United States granted the patent to plaintiffs' predecessor in interest. . . . While nothing ordinarily passes by implication in a patent, *Walton* v. *United States*, 415 F.2d 121 (10th Cir.), an implied easement may arise *within the scope of the patent*.

Id. at 161 (emphasis added).

Similar statements appear in *Utah* v. *Andrus*, (unreported) C 79-0037 (D. Utah Oct. 1, 1979), in which Utah claimed an easement by necessity for access to its school grant lands. Relying on *United States* v. *Dunn*, 478 F.2d 443, 444 n.2 (9th Cir. 1973), the district court concluded: "Although this common law presumption might not ordinarily apply in the context of a Federal land grant, the liberal rules of construction applied to school trust land allowed for the consideration of this common law principle

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[30] The court, in effect, created a hybrid doctrine, applying principles of both ways of necessity and ways created by the actual intent of the grantor:

> Appellant's position is simply that since the patent for the Mission was in unrestricted fee simple it carried with it by implication a way of necessity over lands of the United States for all purposes to which the conveyed land might lawfully be put.
>
> Such is not the law. The scope and extent of the right of access depends not upon the state of title of the dominant estate, nor the existence or lack of limitations in the grant of that estate, but upon what must, under the circumstances, be attributed to the grantor either by implication of intent or by operation of law founded in a public policy favoring land utilization.

Superior Oil Co. v. *United States*, 353 F.2d 34, 36-37 (9th Cir. 1965).

and justify its application here."[31] The Court went on to hold that this right is not absolute, however, It reasoned:

> Under the Constitution Congress has the authority and responsibility to manage Federal land. U.S. Const., art. IV, § 3, cl. 2. . . . There is nothing in the school land grant program that would indicate that when Congress developed the school land grant scheme it intended to abrogate its right to control activity on Federal land. Further, it is consistent with common law property principles to find that the United States, as the holder of the servient tenement, has the right to limit the location and use of Utah's easement of access to that which is necessary for the state's reasonable enjoyment of its right. . . . Thus, the court holds that, although the State of Utah or its lessee must be allowed access to section 36, the United States may regulate the manner of access under statutes such as FLPMA.

Slip Op. at 21.

Cases like *Superior Oil*, *Kinscherff*, and *Utah* v. *Andrus* lend support to my conclusions with respect to implied rights to access across Federal land. While the common law easement by necessity does not run against the United States, a right to access may nonetheless be implied by reference to particular grants. And, to the extent that such implied rights exist, your broad authority—delegated to you by Congress—to manage forest reserves empowers you to regulate their exercise. *See United States* v. *Perko*, 108 F. Supp. 315, 322–23 (D. Minn. 1952), *aff'd*, 204 F.2d 446 (8th Cir.), *cert. denied*, 346 U.S. 832

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[31] Slip Op. at 8. In *United States* v. *Dunn*, 478 F.2d 443 (9th Cir. 1973), the United States sought an injunction to prevent Dunn, who held title as a grantee of a railroad, from constructing an access road for commercial and residential development of his land. The district court granted partial summary judgment, holding defendants trespassers and the Government entitled to immediate possession. The Ninth Circuit reversed, holding that summary judgment was precluded because defendants raised the factual issue whether they had an easement by necessity. *Id.* at 446. The *Dunn* court's only discussion of the application of the doctrine, however, appeared in a footnote response to the dissenting judge. In the dissent, Judge Wright stated simply that he "would hold that under the facts of this case the doctrine of easement by necessity is not binding on the United States. . . ." *Id.* at 446. The majority responded:

> Since the Government did not, in our judgment, raise the point upon which Judge Wright bases his dissent, we have not discussed it in the opinion, but nevertheless did give it consideration and concluded that it lacked merit.

Id. at 444 n.2. I do not find this case persuasive authority for application of the doctrine.

(1953); *Perko* v. *Northwest Paper Co.*, 133 F. Supp. 560, 569 (D. Minn. 1955).

Determining what implied rights exist in the numerous Federal land grants is beyond the scope of this opinion. As set forth above, this determination depends on when the grant was made and for what purpose. Mindful of the goal of giving effect to legislative intent, you must look to the rules the Supreme Court has adopted for interpretation of Federal land grants. As discussed previously, land grants generally are to be strictly construed. This rule must be balanced against the conflicting rule that in some situations, certain types of land grants may deserve a more liberal construction because of the circumstances surrounding passage of the statutes in question. *See generally Leo Sheep Co.* v. *United States*, 440 U.S. 668, 682–83 (1979) (railroad land grants); *Wyoming* v. *United States*, 255 U.S. 489, 508 (1921) (state school land grants). Absent express language to the contrary, however, a grant should not be construed to include broad rights to use retained Government property, particularly in the case of gratuitous grants. *See United States* v. *Union Pac. R.R.*, 353 U.S. 112 (1957); *Camfield* v. *United States*, 167 U.S. 518 (1897); *Wisconsin Central R.R.* v. *United States*, 164 U.S. 190 (1896); 30 Op. Atty. Gen. 263, 264 (1941).

Once the right, if any, is found to exist, you should consider how that right reasonably should be regulated to protect the public's interest in Federal property. It is beyond dispute that such rights are subject to reasonable regulation without a resulting inverse condemnation. *See generally Johnson* v. *United States*, 479 F.2d 1383 (Ct. Cl. 1973) (restriction of access by erection of fence enclosing extended portion of highway held not a taking); 2 Nichols on Eminent Domain § 5.72[1] (1978). Nonetheless, fewer restrictions properly may be imposed on well-established, developed uses than on unexercised rights. *See Penn Central Transp. Corp.* v. *City of New York*, 438 U.S. 104 (1978); *Euclid* v. *Amber Realty Co.*, 272 U.S. 365 (1926). Frustration and appropriation are essentially different things. *United States* v. *Grand River Dam Authority*, 363 U.S. 229, 236 (1960), *citing Omnia Co.* v. *United States*, 261, 502, 513 (1923).

III

Your third question is whether any act of Congress has modified any implied rights that may accompany Federal grants. Of particular concern are the Wilderness Act, 16 U.S.C. 1131–1136, and various wilderness study acts.[32] *See, e.g.*, Montana Wilderness Study Act of 1977, Pub. L. No. 95–150, 91 Stat. 1243; Sheep Mtn. and Snow Mtn. Wilderness Areas, *et al.*, Pub. L. No. 94–557, § 3, 90 Stat. 2635 (1976). These wilderness study acts require you to exercise your discretion so as to preserve the wilderness character of the land.[33] If a request for a particular mode of access would destroy that wilderness character, therefore, you must deny the request. These acts also provide, however, that their mandates are subject to "existing private rights."[34] *See, e.g.*, Montana Wilderness Study Act, § 3(a), 16 U.S.C. 1132 note. You msut determine, therefore, what implied access rights are guaranteed in a particular grant, and allow the exercise of those rights. The wilderness study acts thus do not modify any implied rights that may accompany federal grants.

Nor do I find that the other statutes you cite modify such implied rights. The Organic Act of 1897, 16 U.S.C. 478, discussed at length in Part I of this opinion, preserves access rights existing at the time of creation of a forest reserve. The Act of October 13, 1964, 16 U.S.C. 532–538, which authorizes the Secretary of Agriculture to grant easements for road rights-of-way over lands administered by the Forest Service,[35] was passed in reaction to Attorney

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[32] The impact of the Wilderness Act is discussed in Part IV.

[33] *See Parker* v. *United States*, 448 F.2d 793 (10th Cir. 1971), *cert. denied sub. nom.*, *Kaibab Industries* v. *Parker*, 405 U.S. 989 (1972) (held Secretary's discretion to enter into the timber harvesting contract for public land is limited by 16 U.S.C. 1132(b)).

[34] In addition to "existing private rights," the Wilderness Act permits ingress to and egress from mining locations until December 31, 1983. 16 U.S.C. 1133(d)(3). Such ingress and egress is subject to reasonable regulation by the Secretary of Agriculture, consistent with use of the land for mineral exploration, location, development, production, and related purposes.

[35] 16 U.S.C. 533. *See* p. 10 & note 13 *supra*. This statute was not repealed by FLPMA. With respect to the Secretary of Agriculture's authority under §§ 532–538, FLPMA provided:

> (N)othing in this subchapter shall be construed as affecting or modifying the provisions of sections 532 to 538 of title 16 and in the event of conflict with, or inconsistency between, this subchapter and sections 532 to 538 of title 16, the latter shall prevail: *Provided further*,

General Kennedy's 1962 interpretation of 16 U.S.C. 478, which, as discussed earlier, allowed the imposition of a reciprocity requirement with respect to rights-of-way. By empowering the Secretary of Agriculture to grant permanent easements, the Congress hoped to provide an alternative to statutory assurance of access to and from private inholdings.[36] Thus, the statute does not substantively modify implied rights of access. It does, along with FLPMA, allow the imposition of certain procedural requirements, such as application for a permit prior to road construction. We have found no other statute that substantively modifies implied access rights.

IV.

Your final question concerns § 5(a) of the Wilderness Act, 16 U.S.C. 1134(a). Your Department has concluded that this provision guarantees a private owner "adequate access" to an inholding unless the landowner voluntarily chooses a land exchange. Pursuant to this interpretation, regulations have been promulgated providing that access "shall be given."[37] The Department of Interior has taken the position that section 5(a) grants the Secretary of Interior (and, by analogy, the Secretary of Agriculture) the authority to deny access to a landowner, and offer land

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That nothing in this Act should be construed as making it mandatory, that, with respect to forest roads, the Secretary of Argiculture limit rights-of-way grants or their terms of years or require disclosure pursuant to section 1761(b) of this title or impose any other condition contemplated by this Act that is contrary to present practices of that Secretary under sections 532 to 538 of title 16.

43 U.S.C. 1770(a).

[36] S. Rep. No. 1174, 88th Cong., 2d Sess. 4 (1964). *See* note 10 *supra*.

[37] 36 C.F.R. § 293.12. This regulation provides in part:

States or persons, and their successors in interest, who own land completely surrounded by national Forest Wilderness shall be given such rights as may be necessary to assure adequate access to the land. "Adequate access" is defined as the combination of routes and modes of travel which will, as determined by the Forest Service, cause the least lasting impact on the primitive character of the land and at the same time will serve the reasonable purposes for which the State and private land is held or used.

This regulation is consistent with your Department's interpretation of 16 U.S.C. 478. *See* 36 C.F.R. § 212.8(b).

exchange as indemnity.[38] The Interior Department's interpretation, contrary to yours, under appropriate circumstances would allow denial of "adequate access" to private holdings as well as to State-owned inholdings.

Some initial observations about the Wilderness Act are in order. The purpose of the Wilderness Act is to "secure for the American people of present and future generations the benefits of an enduring resource of wilderness. 16 U.S.C. 1131(a). "Wilderness" is defined as an area of "undeveloped federal land retaining its primeval character and influence, without permanent improvements or human habitation." 16 U.S.C. 1131(c). Section 4(c) of the Act prohibits, with limited exceptions, use of motor vehicles or other mechanical transportation. 16 U.S.C. 1133(c). It also prohibits permanent roads within any wilderness area, except as specifically provided in the Act, and subject to "existing private rights." *Id.* The Act directs you to administer wilderness areas within your jurisdiction so as to preserve their wilderness character. 16 U.S.C. 1133(b). The phrase "existing private rights" in section 4(c), 16 U.S.C. 1133(c), is not defined in the Act or in its legislative history, but, in my opinion, includes existing easements, which are well-recognized rights in property.[39] Thus, in

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[38] Supplemental Memorandum In Support of Plaintiff's Motion for Permanent Injunction, at 14-19, *United States* v. *Cotter, Corp.*, No. C 79-0307 (D. Utah Oct. 1, 1979). The current regulation of the Interior Department's Fish and Wildlife Service, 50 C.F.R. 35.13, although somewhat ambiguous, restricts access to means and routes which will "preserve the wilderness character of the area." The regulation provides:

> Rights of States or persons and their successors in interest, whose land is surrounded by a wilderness unit, will be recognized to assure adequate access to that land. Adequate access is defined as the combination of modes and routes of travel which will best preserve the wilderness character of the landscape. Mode of travel designated shall be reasonable and consistent with accepted, convention, contemporary modes of travel in said vicinity. Use will be consistent with reasonable purposes for which such land is held. The Director will issue such permits as are necessary for access, designating the means and route of travel for ingress and degress *(sic)* so as to preserve the wilderness character of the area.

Id.

[39] *See, e.g, United States* v. *Welch*, 217 U.S. 333, 339 (1910); *Meyers* v. *United States*, 378 F.2d 696, 703 (Ct. Cl. 1967). It logically could be argued that the phrase "existing private rights" includes and preserves only those rights which had been exercised at the time the Wilderness Act was passed. Little support exists, however, for this argument that Congress intended to extinguish unexercised access rights, leaving the landowner with only the right to access or exchange under § 5(a). When providing for preservation only of established uses, Congress clearly so indicated. *See* 16 U.S.C. 1133(d)(1)(permitting established uses of aircraft and motorboats). In S. Rep. No. 109, 88th Cong., 1st Sess. 2 (1963), the Committee stated that under the Wilderness Preservation System, "existing private rights *and* established uses" are permitted to continue. (Emphasis added). A way of access to which a person is entitled by express or implied grant predating the Wilderness Act is a right which existed prior to the effective date of the Act, whether exercised or unexercised.

spite of the Act's general prohibitions, if a private inholder has an implied right to a particular type of access, that right is preserved.

The Wilderness Act was developed over a 15-year period, with almost unprecedented citizen participation. *See* S. Rep. No. 109, 88th Cong., 1st Sess. 7 (1963). The first major wilderness bill was introduced in the 85th Congress. S. 1176, 85th Cong., 1st Sess. (1957). In 1961, the Senate passed a wilderness bill, S. 174, but the House failed to pass it. In 1963, S. 4 was introduced in the 86th Congress. It was identical to S. 174, with one exception not relevant here. It passed the Senate by a large margin (110 Cong. Rec. 17458 (1964)), but was amended in the House (110 Cong. Rec. 17461 (1964)). A conference committee was convened and adopted with few amendments the House version of the bill, H.R. 9070. *See* H.R. Rep. No. 1829, 88th Cong., 2d Sess. (1964). The conference bill was approved by both houses (110 Cong. Rec. 20603, 20632 (1964)) and signed by the President on September 3, 1964.

Section 5(a) of the Act deals with state and private property completely surrounded by wilderness areas. It provides:

> In any case where State-owned or privately owned land is completely surrounded by national forest lands within areas designated by this chapter as wilderness, such State or private owner shall be given such rights as may be necessary to assure adequate accesss to such State-owned or privately owned land by such State or private owner and their successors in interest, or the State-owned land or privately owned land shall be exchanged for federally owned land in the same State of approximately equal value under authorities available to the Secretary of Agriculture: Provided, however, that the United States shall not transfer to a State or private owner any mineral interests unless the State or private owner relinguishes or causes to be relinqished to the United States the mineral interest in the surrounded land.

Since the enactment of the Wilderness Act, your Department has interpreted this language to preserve the statutory right of access you found in 16 U.S.C. 478.[40] Because, in my opinion, section 478 does not grant a right of access

[40] *See* note 37 *supra*.

to inholders other than actual settlers, the question presented here is whether section 5(a) grants to inholders a broad right of "adequate access" beyond any existing private rights. I believe it does not.

The term "adequate access" is not defined in the Act, but the legislative history makes clear that the term includes access not consistent with wilderness uses.[41] For example, in both the Senate and House debates, repeated references were made to road construction for motorized vehicles. *See, e.g.*,107 Cong. Rec. 18105 (1961); 109 Cong. Rec. 5925–26 (1963). Accordingly, your regulation defining "adequate access" does not limit access to established uses or to means consistent with wilderness uses. It includes access which "will serve the reasonable purposes for which the state and private land is held or used."[42] What constitutes adequate access will depend on the facts and circumstances of each case, and is a determination left to your discretion.

The Act requires that the state or private inholder be given such rights as are necessary to assure adequate access, or that the land be exchanged for federally owned land of approximately equal value. The language of § 5(a) indicates that a landowner has a right to access *or* exchange. If he is offered either, he has been accorded all the rights granted by the statute. If you offer land exchange, the landowner has no right of access under § 5(a). This interpretation is supported by the legislative history of the section.[43]

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[41] Other sections apply to uses consistent with wilderness preservation. In section 5(b), 16 U.S.C. 1134(b), Congress provided that where valid mining claims or other valid occupanies are surrounded by a national forest wilderness area, the Secretary of Agriculture shall, by reasonable regulations consistent with the preservation of the area as wilderness, permit ingress to and egress from such surrounded areas by means which have been or are being customarily enjoyed with respect to similarly situated areas. *Cf.* 16 U.S.C. 1133(d) (provides for regulation of ingress and egress consistent with use of land for mineral exploration and development). Section 5(b) did not appear in either S. 174 or S. 4. It did appear in several early House versions of the bill, and these versions expressly included "privately owned lands" in addition to valid mining claims and other valid occupancies. This reference to privately owned lands was deleted in later versions of the bill, such as H.R. 9070. The reports do not explain this deletion. It may have occurred because of the decision during the same session to include privately owned land in section 5(a).

The final paragraph of § 5, 16 U.S.C. 1134(c) authorizes you to acquire state or privately owned land only if either the owner concurs or Congress specifically authorizes the acquisition.

[42] *See* 36 C.F.R. § 293.12, note 27 *supra*.

[43] Your Department relies on the legislative history of subsequent legislation to support its contention that § 5(a) grants a right to adequate access to inholders. In a report filed in conjunction with the Indian Peaks Wilderness Area, *et al.*, 16 U.S.C. 1132 note, the House Committee

The language of § 5(a) first appeared in an amendment to S. 174, 87th Cong., 1st Sess. (1961). Senator Bennett of Utah proposed the amendment in response to concerns of the Western Association of State Land Commissioners, and, accordingly, the amendment pertained only to state-owned land. 107 Cong. Rec. 18092 (1961).[44] The Senator identified a series of "loopholes" in the bill. He described the thirteenth loophole as follows: "No provision is made in S. 174 to preserve the right of access to State school sections or other lands. This should certainly be done or alternatively, the States should be permitted to choose Federal lands in another location in lieu of the land isolated within wilderness areas." *Id.* The choice referred to by Senator Bennett was the choice of lands if access were denied, not the choice of either access or exchange. He stated that the purpose of his amendment was to "give the States access to State lands within wilderness areas established under the bill, or indemnify the States for loss of such access." 107 Cong. Rec. 18103 (1961). He did not indicate that a state could choose between access and indemnity. His amendment provided in part:

> In any case where State-owned land is completely surrounded by lands incorporated into the wilderness system such State shall be given (1) such rights as may be necessary to assure adequate access to such State-

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noted that § 5 of the Wilderness Act requires the Secretary to give private landowners adequate access. H.R. Rep. No. 1460, 95th Cong., 2d Sess. 9–10 (1978). The report does not discuss the exchange option.

This legislative observation is not a part of the legislative history of the Wilderness Act. It is the intent of the Congress that enacted a law that controls interpretation of that law. *United Airlines, Inc.* v. *McMann*, 434 U.S. 192, 200 n.7 (1977); *Teamsters* v. *United States*, 431 U.S. 324, 354 n.39 (1977). Whatever evidence is provided by the report on the subsequent legislation is overcome by conflicting evidence. *See Southeastern Community College* v. *Davis*, 442 U.S. 397, 411–12 (1979); *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 758 (1979).

[44] The resolution passed by the Western State Land Commissioners suggested that the bill be amended to contain the following provision:

> Whenever an area including Sate-owned land is incorporated in the wilderness system, provision shall be made for access to such land adequate for the reasonable exercise of its rights therein by the State and those claiming under it . . . . Provided, however, that, if the recommendation by which an area including State-owned land is incorporated in the wilderness system shall fail to provide for access to the State-owned land therein, then the owning State may, at its election, use the included State land as base in making indemnity selection of lands, including the mineral rights therein as provided in applicable U.S. statutes.

107 Cong. Rec. 18103 (1961). The resolution illustrates that the Commissioners also believed access could be denied. The indemnity statutes to which the resolution refers, 43 U.S.C. 851, 852, allow states to make indemnity selections whenever school sections are lost because of other reservations or grants of the land.

> owned land by such State and its successors in interest, or (2) land in the same State, not exceeding the value of the surrounded land, in exchange for the surrounded land. Exchanges of land under the provisions of this subsection shall be accomplished in the manner provided for the exchange of lands in national forests.

107 Cong. Rec. 18103 (1961). In urging support of his amendment, Senator Bennett explained:[45]

> (T)he Western Association of State Land Commissioners unanimously adopted a resolution calling for indemnification to the States *which will lose access* to State lands in wilderness areas established under S. 174. Where State school sections or other State lands are isolated by wilderness areas, the State should be given an opportunity, *if access is denied*, to make in lieu selections of Federal lands in other areas.

Id. (emphasis added).[46] These statements demonstrate that Senator Bennett believed that access not consistent with wilderness preservation could be denied, and wanted to give states an alternative in such circumstances.

The Senator later explained that his amendment was designed to correct problems states had experienced with land exchanges in the past. 107 Cong. Rec. 18105 (1961). He wanted to ensure that if the state land was "locked up," the state clearly would be entitled to an exchange. He further explained:

> *The first choice, providing that the State shall have adequate access, would in fact defeat the value of the wilderness bill*, assuming there were a very valuable mineral in a State school section, and the State were to decide that it was worth money to drive a road through the wilderness to get to it. This would change the situation with respect to existing law, because we would be imposing particular restrictions, in spirit at least, with respect to access to the land.

Id. (emphasis added).

Because of misunderstandings regarding the effect of the proposed amendment on mineral lands, Senator Bennett withdrew the amendment to allow time to confer with

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[45] Authority to exchange land is provided by 16 U.S.C. 485, 486 (originally enacted as Act of Mar. 20, 1922, ch. 105, 42 Stat. 465) and 16 U.S.C. 516 (originally enacted as Act of Mar. 3, 1925, ch. 473, 43 Stat. 1215).

[46] His belief that access to state-owned lands may be denied entirely may result in part from the language of § 4(c), 16 U.S.C. 1133(c), which specifically protected only existing *private* rights. He made no statements relying on this language, however.

other Senators from Western States. He re-offered the amendment the following day, with minor changes not relevant here. 107 Cong. Rec. 18384 (1961). Senator Church, who earlier had expressed reservations about the amendment, now voiced his support. In his brief remarks, he stated:

> I think the amendment is fair to the States involved. If they need rights of access, they should have them; if they want to relinquish the land, they ought to have the right to acquire other land of comparable value.

Id. Although we can infer from these remarks an understanding that the section gives States the option of choosing access or exchange, the statement does admit of other interpretations. In light of the evidence to the contrary, the resolution of this question cannot be rested on the remarks of one senator during debate on the Senate floor, where "the choice of words . . . is not always accurate or exact." *In re Carlson*, 292 F. Supp. 778, 783 (C.D. Cal. 1968), *citing United States* v. *Internat'l Union UAW-CIO*, 352 U.S. 567, 585–86 (1957). If the Congress had intended to grant landowners a right to adequate access, it could have done so expressly. Resolving the doubt in favor of the grantee of such a right would violate the well-established rule that any doubts as to congressional grants of property interests must be resolved in favor of the government. *Andrus* v. *Charleston Stone Prod. Co.*, 436 U.S. 604, 617 (1978); *United States* v. *Union Pac. R.R.*, 353 U.S. 112, 116 (1957).

The Senate agreed to Senator Bennett's amendment to S. 174, but S. 174 did not pass the House during the 87th Congress. A House version of the bill did include a similar provision, also applicable only to State-owned land. The House report on this bill indicated that the section required only that a state be given either access or exchange; it did not indicate that the state could choose between them, or that adequate access otherwise was guaranteed. It stated:

> If surrounded land is owned by a State, the State would be given *either* right of access or opportunity of exchange . . . Ingress and egress would be provided for all valid occupancies.

H.R. Rep. No. 2521, 87th Cong., 2d Sess. 108 (1962) (emphasis added).

Variations of Senator Bennett's amendment appeared in both the Senate and House versions of the wilderness legislation in the 88th Congress. S. 4, 88th Cong., 1st Sess. § 3(j) (1963); H.R. 9070, 88th Cong., 2d Sess. § 6(a) (1964). The Senate committee report on S.4 indicates that the understanding that states could be denied access and offered a land exchange as indemnity remained unchanged:

> Section 3(j) provides that where State inholdings exist in wilderness areas, the State shall be afforded access, or shall be given Federal lands in exchange of equal value.
>
> . . . .
>
> The amendment is an attempt to clarify the intention of the Senate in regard to section 3(j), which was originally proposed, withdrawn, revised, again proposed and adopted during floor consideration of S. 174 in 1962 [sic]. The amended section represents a more deliberate and careful drafting and consideration.

S. Rep. No. 109, 88th Cong., 1st Sess. 10, 20–21 (1963).

The House modified this section to include "privately owned land" in the first paragraph regarding "adequate access," rather than in the second paragraph regarding "ingress and egress." This modification is not explained in the House report. *See* H.R. Rep. No. 1538, 88th Cong., 2d Sess. 13 (1963). The change was discussed in both the Senate and House hearings, however. The sentiment expressed was that private owners should have the same rights as the States. National Wilderness Preservation Act: Hearings on H.R. 9070, H.R. 9162, S. 4 and Related Bills, Before the Subcomm. on Public Lands of the House Comm. on Interior and Insular Affairs, 88th Cong., 2d Sess. 1369–72 (1963). Both public witnesses and congressmen stated that ingress and egress was uncertain under both 16 U.S.C. 478 and the wilderness acts, and that the same provision for exchange should be made for private owners as was made for States. *Id.* There is no indication that this addition of privately owned lands modified the purpose of the section as identified by Senator Bennett.

In sum, if uses are well-established prior to wilderness

designation, they may be permitted to continue.[47] In addition, all existing private rights of access are preserved. Even if the landowner has no prior existing right to access not consistent with wilderness uses, the Wilderness Act requires that "adequate access" be given or that an offer be made to the landowner to exchange the land for Federal land of approximately equal value. As a result of § 5(a), therefore, the inholder actually may possess more access "rights" than were possessed prior to wilderness designation. If the landowner rejects an offer of land exchange, he may retain title to the inholding and exercise access rights consistent with wilderness uses, or he may consent to acquisition of his land by the Federal Government.

These responses to the questions you have asked should provide satisfactory guidance in your performance of your Federal land management responsibilities.

Sincerely,

BENJAMIN R. CIVILETTI.

[47] Section 4(d)(1) of the Act, 16 U.S.C. 1133(d)(1), provides that the "use of aircraft or motorboats, where these uses have already become established, may be permitted to continue subject to such restrictions as the Secretary of Agriculture deems desirable." The committee reports reveal an intent that other well-established uses also be permitted to continue. *See, e.g.*, S. Rep. No. 109, 88th Cong., 1st Sess. 2, 10 (1963). *See also* 109 Cong. Rec. 5926 (1963) (Senator Church, a sponsor of the bill, expressed the view that owners of ranches be allowed to continue "the customary usage of their property for ingress and egress according to the customary ways").

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